87-1390

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

MAKAH TRIBE, et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a major new exception to the reach of 42 U.S.C. §1983 be created such that §1983 becomes available to vindicate deprivations of federal treaty rights only after the exact scope of those rights becomes "known and well-delineated" by Supreme Court decision, rather than from the outset of the litigation when violations of the rights are alleged in a complaint?

2. Should the qualified good faith immunity available for government officials in civil damage actions be extended such that in actions solely for declaratory and injunctive relief attorneys fees are not available under 42 U.S.C. §§1983 and 1988?

3. Can successful constitutional claims which were not challenged on appeal be

characterized as "insubstantial" within the meaning of Hagans v. Lavine, 415 U.S. 528 (1974), for purposes of awards of attorneys fees?

PARTIES

The United States and twenty one Indian tribes are plaintiffs in the underlying district court action commenced in 1970 against the State of Washington, its Departments of Fisheries and Wildlife and the Directors of those Departments. The twenty one plaintiff tribes are the Quinault, Quileute, Hoh, Makah, Lummi, Muckleshoot, Squaxin Island, Skokomish, Lower Elwha Klallam, Port Gamble Klallam, Jamestown Klallam, Stillaguamish, Sauk-Suiattle, Nisqually, Swinomish, Tulalip Puyallup, Suquamish, Upper Skagit, Yakima and Nooksack Tribes. Respondents are the State of Washington, the Washington Departments of Fisheries and Wildlife, and the Directors of those Departments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Treaties:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, twenty one Indian tribes, request that a writ of certiorari issue to review the questions presented by the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on March 31, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 813 F.2d 1020, and is attached as Appendix A. The orders of the District Court are published at 626 F.Supp. 1426 and 626 F.Supp. 1504 and are attached as Appendices B and C, respectively. The First and Second Reports and Recommendations of the Magistrate are published at 626 F.Supp. 1506 and 626 F.Supp. 1526 and are attached as Appendices D and E.

JURISDICTION

The opinion of the Court of Appeals was entered on March 31, 1987. The petitioners herein filed a timely petition for rehearing which the Court of Appeals denied September 15, 1987. Appendix F. On December 1, 1987, Justice O'Connor signed an order extending the time for filing this petition for certiorari to and including January 13, 1988. Appendix G.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL STATUTES AND TREATY PROVISIONS INVOLVED

Article 5 of the Treaty of Point Elliott, January 22, 1885, 12 Stat. 927, reads:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens ....

Similar provisions are contained in the Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; the Treaty with the Quinault, July 1, 1855, 12 Stat. 971; the Treaty of Point No Point, January 26, 1855, 12 Stat. 933; the Treaty with the Makah, January 31, 1855, 12 Stat. 939; and the Treaty with the Yakimas, June 9, 1855, 12 Stat. 951.

42 U.S.C. §1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

> subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988 reads, in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

I. STATEMENT OF THE CASE

1. Introduction.

By this Petition for Certiorari, 21 Washington Tribes seek review of the decision of the Ninth Circuit Court of Appeals, reported at 813 F.2d 1020 (9th Cir. 1987), which reversed a $2,948,770.76

award of attorneys' fees and costs to the Tribes in United States v. Washington,[1] the nine-year court struggle to implement the Tribes' treaty fishing rights which culminated in this Court's decision in State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). The fees were awarded pursuant to 42 U.S.C. §1988 on the ground that

> [i]n United States v. Washington the Tribes alleged, and ultimately prevailed upon, a cause of action under 42 U.S.C. §1983, one of the civil rights statutes referred to [in §1988] in that they alleged and proved deprivations, under color of state law, of "rights, privileges and immunities secured by the

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[1] United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086, reh'g denied, 424 U.S. 978 (1976); 459 F. Supp. 1020 (W.D. Wash. 1978), aff'd sub nom. Puget Sound Gillnetters Association v. United States District Court, 573 F.2d 1123 (9th Cir. 1978), aff'd, modified and remanded sub nom., Washington v. Commercial Passenger Fishing Vessel Association, 443 U.S. 658, modified, 444 U.S. 816 (1979).

> Constitution and laws" within the meaning of §1983.

Order Regarding Attorneys' Fees, May 8, 1981, 626 F.Supp. 1405, 1426, Appendix B. The district court concluded that the Tribes were entitled to an attorney fee award

> for the services reasonably necessary to prepare for, try, prosecute and implement the United States v. Washington decision, including the related appeals to the Ninth Circuit Court of Appeals and the United States Supreme Court.

Id. at 3.

In the decision below, the Court of Appeals reversed, holding that the Tribes had not stated a claim under 42 U.S.C. §1983 because although "the Indians had rights under the treaty[,] [j]ust exactly what those rights were was unknown until the Supreme Court decision." 813 F.2d at 1023. No "actual conflict" between state and federal law had occurred which would give rise to a §1983 action, the court

held below, because the treaty rights, until this Court's 1979 decision, were not "known and well-delineated rights." Id. In addition, the Court of Appeals held that the tribes were not entitled to an award of attorneys' fees based on their pendent constitutional claims, on which the Tribes prevailed in the district court and which were not challenged or disturbed on appeal, because "any Fourteenth Amendment claims lurking about were 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" 813 F.2d at 1024, citing Hagans v. Lavine, 415 U.S. 528, 537 (1974).

Petitioners discuss first the underlying United States v. Washington proceedings, and second the attorney fee proceedings.

2. United States v. Washington Proceedings.

United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) was filed in

1970 by the United States, on its own behalf and as trustee for several Indian tribes. CR 1. Those tribes, later accompanied by additional tribes, joined as intervenor-plaintiffs, and the State Departments of Fisheries and Game and their respective directors were joined as defendants. See Pretrial Order par. 8, CR 353. The tribes alleged that the State of Washington and its officials acting under color of State law had deprived them and their members of rights secured by the Stevens Treaties and by the equal protection and due process clauses of the Fourteenth Amendment. The complaints of two of the Tribes referred specifically to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), see complaints of the Hoh and Upper Skagit Tribes, CR 77 and CR 102, and the complaints of other tribes, although not referring to §1983 by name, contained

specific allegations of denials of due process and equal protection under the Fourteenth Amendment, as well as deprivations of the "civil rights" of individual Indians arising from discriminatory State enforcement practices.[2]

In the Court's final Pretrial Order, CR 353, the State stipulated to jurisdiction under 28 U.S.C. §1343(3) and (4), the jurisdictional counterpart to §1983, as well as under 28 U.S.C. §§1331, 1345 and 1362. The Order recited that §1343 jurisdiction existed on the ground that

> the plaintiff Tribes allege that defendants State of Washington, and its Departments of Fisheries and Game have, under color of State law, regulation, custom and usage, deprived them of rights secured to them in the treaties cited above ... and under the Constitution of the

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[2] See, e.g., Muckleshoot complaint, par. 1(g), 22, 23, 31 (lodged August 16, 1971 and later filed - no CR number assigned); Yakima complaint par. 6, 10, CR 75; Hoh and Upper Skagit complaints, CR 77, 102; see also United States complaint, par. 15, 16, CR 1.

United States, and those Tribes seek equitable relief for that deprivation.

In 1974, after a lengthy trial, District Court Judge Boldt entered a comprehensive decision that upheld the Tribes' rights to take up to one-half the harvestable fish, 384 F. Supp. at 342-43, and enjoined enforcement of eleven State statutes and three State regulations found not to meet appropriate due process and treaty standards. See 384 F. Supp. at 401-04, 407 (par. 20), 415. With respect to the Tribes' treaty infringement claims, Judge Boldt noted that each of the Stevens Treaties[3] "secured to the Indians rights, privileges, and immunities distinct from those of other citizens," CL 19, 384 F.

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[3] Treaty with the Quinault, July 1, 1855, 12 Stat. 971; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Treaty of Point No Point, January 26, 1855, 12 Stat. 933.

Supp. at 401, in language typified by the Treaty of Medicine Creek:

> the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, ...

384 F. Supp. at 350 (emphasis added). Judge Boldt referred to the fishing right as a "constitutional right," a "personal right" and as a "civil treaty right." 384 F. Supp. at 337. Judge Boldt concluded that the reserved treaty fishing right existed in part "to provide a volume of fish which is sufficient to the fair needs of the Tribes." CL 20, 384 F. Supp. at 401. The district court found that enforcement of State laws and regulations against Indians exercising their treaty fishing rights had resulted in

> loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians.

Finding 193, 384 F. Supp. at 388.

Critically, the district court ruled in favor of the Tribes on their allegations of constitutional deprivations. It held that State laws and regulations pertaining to game fish (steelhead), which reserved the entire steelhead harvest to one interest group - state licensed sports fishermen, "discriminate[d] illegally against the treaty Indians," CL 39, 384 F. Supp. at 403-04, and that the Department of Game determination in two hearings in 1972 and 1973 to ban all Indian net fishing on the steelhead runs, "did not accord treaty Tribes a hearing in conformity with due process of law ...." CL 42, 384 F. Supp. at 404 (emphasis added). With respect to the State's enforcement practices, Judge Boldt held:

> The seizure and damage, destruction, disposition or unreasonably long detention of fishing gear and other property of members of the plaintiff Tribes

> ... without any judicial determination of confiscation or forfeiture is an unlawful deprivation of the rights of said members under the Fourteenth Amendment of the Constitution of the United States and the Treaties ....

CL 43, 384 F. Supp. at 404 (emphasis added).[4]

Application of current State laws and regulations were held "to discriminate against the Tribes' treaty right to take fish" and such laws were "adopted and enforced in violation of appropriate

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[4] The holdings of constitutional deprivation were grounded on findings that the State closed certain tribal usual and accustomed fishing places to fishing by the Tribes while permitting commercial non-Indian fishing on the same runs elsewhere, FF 218, 384 F. Supp. at 393, and that the State "discriminated illegally" against the Indians by reserving all of the steelhead for sports fishermen, CL 39, 384 F. Supp. at 403. See also FF 194, 195, 223 and 224 regarding various denials of hearings in violation of procedural due process, 384 F. Supp. at 388, 394-95, and FF 194 regarding State enforcement activities against Indians "in a manner different from that expressly provided in [State] . . . regulations." 384 F. Supp. at 388.

standards," CL 38, 384 F. Supp. at 403 (emphasis added), referring to Conclusions of Law 29, 31 and 32 establishing that to be "appropriate" State regulations must

> (a) not discriminate against the treaty Tribes' reserved right to fish;
>
> (b) meet appropriate standards of substantive and procedural due process ....

384 F. Supp. at 402 (emphasis added).[5]

On the State's appeal, the Court of Appeals affirmed, 520 F.2d 676 (9th Cir. 1975) and certiorari was denied. 423 U.S. 1086, reh'g denied, 424 U.S. 978 (1976). In its appeal, the State challenged the district court's interpretation of the treaties, but did not specifically challenge the holdings of constitutional

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[5] To meet the due process standard, State regulations affecting Indian fishing "must receive a full, fair and public consideration"; to be nondiscriminatory State regulations must provide an opportunity for treaty Indians to take their 50% share. CL 31 and 32, 384 F. Supp. at 402-03.

deprivation. As a result, the Court of Appeals affirmed, simply noting the district court's constitutional holding:

> In addition, [State] regulation must not discriminate against treaty Indians and must meet appropriate due process standards.

520 F.2d at 683. The 50% allocation was approved as was the district court's conclusion that "Washington could not apply its existing fishing regulations to members of the treaty Tribes without violating their federal treaty rights." 520 F.2d at 682.

Notwithstanding the Court of Appeals' affirmance and the denial of certiorari by this Court, an enforcement crisis quickly developed. The district court's injunction required the State Department of Fisheries to adopt regulations protecting the Indian treaty fishing rights. 384 F. Supp. at 416-17. After new State regulations were promulgated,

however, they were immediately challenged by private citizens in state court. Those proceedings led to two State Supreme Court decisions which rejected the federal courts' holdings that the Stevens Treaties secured to the Indians a right to a fair share of the fish runs, and concluded that recognition of "special rights" for Indians would violate the equal protection clause. See Puget Sound Gillnetters Association v. Moos, 88 Wn.2d 677, 565 P.2d 1151 (1977) and Washington State Commercial Fishing Vessel Association v. Tolefson, 89 Wn.2d, 276, 571 P.2d 1373 (1977), discussed by this Court in Passenger Fishing Vessel, 443 U.S. at 672-74. After the State Department of Fisheries was ordered by the State courts to abandon its attempts to promulgate regulations in compliance with the district court orders, and the State Department of Game simply refused to

comply, the district court entered a series of orders to enforce implementation of the Tribes' treaty rights directly through its contempt powers with the assistance of the United States Attorney and various federal enforcement agencies. The enforcement orders are reported at 459 F. Supp. 1020 et seq. and at 626 F.Supp. 1405 et seq.

The enforcement orders were appealed and in 1978 the Court of Appeals reconfirmed that the Tribes were entitled to an allocation of up to 50% of the harvestable fish. It also upheld the district court's authority to enforce implementation of the treaty right through its contempt powers. Puget Sound Gillnetters, supra, 573 F.2d 1123 (9th Cir. 1978). The Court of Appeals criticized the State of Washington for its attitude of "total intransigence," 573 F.2d at 1130, and noted:

> The State's extraordinary machinations in resisting the Decree

> have forced the District Court to take over a large share of the management of the State's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted] ... the District Court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

573 F.2d at 1126, quoted in Fishing Vessel, 443 U.S. at 696, n.36.

In 1978, this Court granted petitions for certiorari in both the state and federal cases. It noted that "[b]ecause of the widespread defiance of the district court's orders, this litigation has assumed unusual significance." 443 U.S. at 674. With minor variations, this Court affirmed Judge Boldt's original 1974 ruling providing for an equal allocation of harvestable fish between Indian and non-Indian fishermen,[6] and confirmed the

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[6] The variations were that ceremonial and subsistence fish and fish caught on the reservation were required to be included in calculating the Tribes' 50% share in addition to fish caught off-

district court's authority to enforce its orders and the federal supremacy of the treaty rights as implemented through the federal court orders. 443 U.S. at 695.

Since the State appellants had not raised the issues, this Court did not address whether the district court's findings of constitutional deprivation were correct.[7] This Court also did not directly address whether the tribes had stated a valid §1983 claim. However, in language parallel to the §1983 phrase

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reservation for commercial purposes. 443 U.S. at 687-88.

[7] But see the Court's references to "discriminatory State regulation" of Indian fishing, 443 U.S. at 669, and "illegal regulation." Id. at n.14. The Court also rejected the State's characterization of its conduct as assuring Indians and non-Indians alike an "equal opportunity" to take fish from State waters, noting that in 1974, before the district court's injunction took effect, and while the Indians were still operating under the State's "equal opportunity" doctrine, the Indian take amounted to only approximately 2% of the total harvest of salmon and steelhead in the treaty area. 443 U.S. at 676, n.22.

"rights . . . secured by the constitution and laws," this Court repeatedly referred to the Stevens Treaties as "securing rights" to the Tribes, see, e.g., 443 U.S. at 674, 678, 679, 685, 686,[8] noted that the treaties "confer enforceable special benefits on signatory Indian Tribes," 443 U.S. at 673 n.20, and emphasized that the treaties were self-executing and not dependent on implementing legislation for their enforcement. 443 U.S. at 693 n.33.

This Court emphatically stated that the Tribes' federal treaty rights were unambiguous and explicitly recognized by

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[8] This Court also noted that Governor Stevens, in negotiating the treaties with the Tribes, referred to the Tribes' fishing rights as being "secured." Governor Stevens told the Tribes:

> This paper secures your fish? [sic] Does not a father give food to his children?

443 U.S. at 667 n.11. The treaties themselves speak of "rights" being "secured." See Treaty of Medicine Creek, supra at 11.

prior decisions, characterizing the treaty interpretation issue as "virtually a 'matter decided.'" Prior decisions, the Court stated, "foreclosed the basic argument that the State is now advancing." 443 U.S. at 683.[9]

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[9] The Court stated:

> In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish ... This interpretation is not open to question.
>
> . . .
>
> The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court ... more or less explicitly rejected the State's "equal opportunity" approach; in the earliest and the three most recent cases, moreover, we adopted essentially the interpretation that the United States is reiterating here.

443 U.S. at 679.

3. Attorney Fee Proceedings.

Immediately after Judge Boldt's 1974 decision, the Tribes moved for an award o attorneys fees pursuant to the "private attorney general," "bad faith" and "commo fund" theories. See 813 F.2d at 1022. The District Court found that an award of attorneys' fees would be appropriate unde the private attorney general theory, but held that the award was barred by the Eleventh Amendment. 66 F.R.D. 477 (1974). While the Tribes' appeal was pending, thi Court decided Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), eliminating the private attorney general theory as a basis for a fee award, and the Court of Appeals dismissed the appeal and remanded for a determination i light of Alyeska. 813 F.2d at 1022.

After the remand, Congress enacted the Civil Rights Attorney Fee Awards Act, 42 U.S.C. §1988, which reinstated the

private attorney general theory for awards of fees in actions brought under the Civil Rights Statutes, including 42 U.S.C. §1983. A status report requested by Judge Boldt reflected that the attorney fee issue was still pending in August 1978, CR 4768, but Judge Boldt retired in February 1979 before deciding it. District Court Judge Walter Craig was designated Judge Boldt's successor in United States v. Washington and at Judge Craig's request, the Tribes filed a renewed motion for award of attorney fees on October 30, 1980. On May 8, 1981, Judge Craig ruled that the Tribes had alleged and prevailed upon a cause of action under 42 U.S.C. §1983 and were entitled to an award of attorneys' fees under 42 U.S.C. §1988 because "they alleged and proved deprivations, under color of state law, of 'rights, privileges and immunities secured by the Constitution and laws' within the

meaning of §1983." Order Regarding Attorneys' Fees, 626 F. Supp. at 1426. Appendix B. Judge Craig determined that United States v. Washington was pending when 42 U.S.C. §1988 was enacted and that the Tribes were entitled to an attorney fee award for the district court, court of appeals and Supreme Court proceedings. Id. at 26. He referred the fee claim to Magistrate John L. Weinberg for a recommendation as to the quantification of the award. Id. at 25.

Magistrate Weinberg determined that the Tribes had met with "exceptional success" in United States v. Washington, that the quality of representation was "extremely high" and that the tribes should recover a fully compensatory fee. 626 F.Supp. 1506, 1524, Appendix D. He recommended an award for most, but not all of the time claimed, and that the award should be calculated using historic hourly

rates adjusted for inflation. He recommended that no multiplier be utilized. The Magistrate's proposed fee award was $2,316,949.96.

The District Court adopted the Magistrate's recommendation with two exceptions - changing the historic hourly rate schedule for several years and modifying the calculation of the delay factor and of travel time. No multiplier was awarded. The final award entered by the District Court was $2,948,770.76 in attorneys' fees and costs. The award was for the work of 29 attorneys representing 21 tribal plaintiffs over a twelve-year period and included the trial and post-decision enforcement proceedings, as well as the Court of Appeals and Supreme Court proceeding.[10]

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[10] Since the Court of Appeals did not reach the question of the quantification of the award, Petitioners do not elaborate concerning the methods used to calculate the award.

On the State's appeal, the Court below reversed. It held that the questio whether the Tribes had stated a claim under 42 U.S.C. §1983 was answered by the fact that this Court had considered the principal question before it in Passenger Fishing Vessel to be one of "treaty interpretation." 813 F.2d at 1022. Critically, the Court of Appeals inaccurately characterized Passenger Fishing Vessel as containing no discussio of the State violating the Indians' right under the treaties.[11] 813 F.2d at 1023.

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[11] See particularly 443 U.S. at 695-96:

> The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders to remedy the violations of federal law found by the court.

(Emphasis added.) See also id. ("State recalcitrance," "concerted official . . . efforts to frustrate [the court decree]"; 443 U.S. at 669 and n.14 ("discriminating

To the Court of Appeals, the dispositive factor was its view that the exact nature of the Tribes' treaty fishing rights was unknown until this Court's 1979 decision:

> It is not disputed that the Indians had rights under the treaty. Just exactly what those rights were was unknown until the Supreme Court decision. If the State of Washington violates these now known and well-delineated rights, there would be an actual conflict between state and federal law which might give rise to a §1983 action. See White Mountain Apache Tribe v. Williams, 798 F.2d 1205 (9th Cir. 1985), as amended by 810 F.2d 844, 850, n.8 (9th Cir. 1987), cert. denied sub nom. White Mountain Apache Tribe v. Arizona State Transportation Board, _____ U.S. ____, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). That, however, has not yet happened and is not the situation here.
>
> We therefore hold that the Tribes' treaty interpretation

State regulation" and "illegal regulation"); 443 U.S. at 674 ("widespread defiance of the District Court's orders"); 443 U.S. at 676 n.22 (application of State law based on "equal opportunity doctrine netted the Indians" virtually no catch at all -- 2% of the total harvest before the district court injunction took effect).

> claims do not give rise to a claim cognizable under §1983.

813 F.2d at 1023.

With respect to the Tribes' argument for attorneys' fees based on their successful pendent constitutional claims, the court held that "the Fourteenth Amendment claims do not meet the substantiality test of Hagans v. Lavine, 415 U.S. 528 (1974)." Although the tribes' pointed out that they had prevailed on their constitutional claims, and the court below conceded that the district court "made mention" of equal protection and due process, it held that to be "mainly in the sense regarding future State regulations." 813 F.2d at 1024. The court also conceded that State laws "discriminated" against Indians and rendered the treaty rights "nugatory," but explained that no constitutional issues were presented because the State acted illegally "only in the sense that [it] failed to recognize

the special entitlement the Indians were to be given." Id. Finally, although the Tribes were appellees, the court concluded that the tribes must have "abandoned their equal protection arguments after the initial complaints and initial District Court's decision" because this Court did not mention equal protection in its 1979 affirmance.[12] Id.

The Tribes' Petition for Rehearing was denied by the Court of Appeals on September 15, 1987.

II. REASONS FOR GRANTING THE WRIT

Summary Of Reasons

Petitioners assert three reasons for granting the writ. First, the decision of the Court of Appeals would create a major new exception to the general availability of 42 U.S.C. §1983 and 42 U.S.C. §1988 to remedy deprivations of federal rights

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[12] But see Passenger Fishing Vessel, 443 U.S. at 669 ("discriminatory State regulation").

secured by the Constitution and laws beyond the limited exceptions recognized in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). The Court held that with respect to federal rights that require interpretation by the courts, §1983 is not available to vindicate the right until after those rights become clarified by a Supreme Court decision. This new exception created by the Court below conflicts with decisions of this Court and the decisions of other Courts of Appeal.

Second, in effect, the decision below extends the scope of the qualified good faith immunity available to state officials in civil damage actions to immunity for attorneys fees in actions purely for declaratory and injunctive relief. This extension of the immunity

doctrine is unprecedented and conflicts with Congressional purposes in establishing 42 U.S.C. 1988, the decisions of this Court and the decisions of other Courts of Appeal.

Finally, the decision below would allow courts to deny attorney fee awards pursuant to 42 U.S.C. §1988 where pendent constitutional claims have not only been pled, but successfully litigated, by deeming such successfully litigated claims "unsubstantial" within the meaning of Hagans v. Lavine, 415 U.S. 528 (1974). This interpretation of Hagans is at odds with decisions of this Court and with the intent of Congress as expressed in the legislative history of 42 U.S.C. §1988.

For each of the above three reasons, petitioners ask that certiorari be granted to review the decision of the Ninth Circuit Court of Appeals.

1. The Court of Appeals' Holding That 42 U.S.C. §1983 Becomes Available to Vindicate Deprivation of Federal Rights Only After the Rights Become "Known and Well-Delineated" By Supreme Court Decision Creates a Major New Exception to the Reach of Section 1983. The Holding Conflicts With the Decisions of This Court and the Courts of Appeals of Other Circuits.

Without authority, the Court of Appeals has fashioned a major exception to the general availability of 42 U.S.C. §1983 to remedy official deprivations of rights "secured by the Constitution and laws" that goes far beyond the limited exceptions recognized by this Court in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). The Court of Appeals held that only "known and well-delineated" rights are cognizable under §1983 and viewed the fact that this Court interpreted the treaties in its 1979 decision as being inconsistent with their

status as "rights . . . secured by the Constitution and laws" under §1983. Thus, notwithstanding this Court's Passenger Fishing Vessel holding that the purpose and language of the treaty right was "unambiguous," 443 U.S. at 679, and that the district court's treaty construction had been approved twice on appeal, the Court of Appeals concluded that no §1983 claim was presented in United States v. Washington because, "although it was not disputed that the Indians had rights under the treat[ies,] [j]ust exactly what those rights were was unknown until the Supreme Court decision." 813 F.2d at 1023. If the State were to violate these "now known and well-delineated rights," the court stated, a §1983 action might lie. "That, however, has not yet happened and is not the situation here." Id. (Emphasis added.) Deprivations of the tribes' treaty rights became actionable

under §1983 only after they were interpreted by this Court.

It is not unusual, of course, that the exact nature and scope of federal rights may not be determined with judicial finality until Supreme Court review is obtained. In that sense, the precise scope of federal rights, whether they arise by statute, treaty or from the Constitution, may always be subject to some uncertainty until Supreme Court review is obtained. To hold, as did the Court of Appeals, however, that such final appellate clarification is a precondition to the cause of action under §1983 is an unprecedented and dangerous principle which calls for this Court's attention and correction. It conflicts in principle with the decisions of this Court and other courts of appeal and contradicts the Congressional policies implicit in 42 U.S.C. §1983 and §1988 to encourage

vindication of federal rights against abridgement by state and local officials.

The federal rights at issue in United States v. Washington were specifically secured by the Stevens treaties and did not spring into being in 1979 when this Court affirmed the underlying District Court and Court of Appeals decisions. That this Court, like the lower courts, was required to interpret the treaties does not undermine the fact that the source of the right is in the treaties and not the 1979 Supreme Court decision. The Tribes claimed from the outset of the litigation in 1970 that they had rights secured by the constitution and laws which had been abridged by State officials. See Statement of the Case at 8-9. When this Court affirmed the district court's 1974 decision, it simply confirmed that original claim. Contrary to the Court of Appeals' suggestion, the 1979 Supreme

Court decision did not cause a basic metamorphosis of United States v. Washington. It did not commence being a §1983 case in 1979.

Assuming, arguendo, the correctness of the Court's characterization of the rights as not being "known or well-delineated,"[13] the decision below conflicts in principle with decisions of this Court confirming that federal rights that depend upon federal court articulation to determine their nature and scope

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13 Ironically, the fishing rights at issue in United States v. Washington were "known and well-delineated," and the Ninth Circuit Court of Appeals misapplied its own newly-created exception. This Court described the treaty language and purpose as "unambiguous." 443 U.S. at 679. By the time this Court decided Passenger Fishing Vessel, Judge Boldt's decision interpreting the treaties had already been affirmed twice by the Court of Appeals and certiorari denied once. The treaties had been subject to extensive judicial interpretation in a series of earlier Supreme Court cases which left the question of the Indians entitlement to a fair share of the fish runs "virtually a 'matter decided' by [this Court's] previous holdings." 443 U.S. at 679.

can be asserted under §1983. For example, in Board of Education v. Pico, 457 U.S. 853, 867, (1982) local school boards were prevented from removing certain library books because the "right to receive information and ideas" is "an inherent corollary of the rights of free speech and press." In Youngberg v. Romeo, 457 U.S. 307, 319 (1982), involuntarily committed mentally retarded persons were found to have an implicit right to minimally adequate or reasonable training to insure their constitutional rights to safety and freedom from bodily restraint. This Court has read the Fourth Amendment to create an implicit right to be free from unreasonable use of deadly force. Tennessee v. Garner, 471 U.S. 1 (1985). None of these rights was "known and well-delineated" from the outset of the litigation as the Court of Appeals has required here as a precondition for §1983 relief. By the

same token, various Courts of Appeal have also confirmed the availability of §1983 to secure federal rights that cannot be said to have been "known and well-delineated" in advance of their judicial articulation and development.[14]

The decision below also conflicts with a series of recent decisions, Maine v. Thiboutot, 448 U.S. 1 (1980), Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), Middlesex County Sewage Authority v. National Sea Clammers

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[14] For example, in Keaukaha-Panaewa Community v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir. 1984) an implied right under the Hawaiian Admission Act, Public Law No. 86-3, 73 Stat. 5, to have trust lands used in specified ways, was held to be actionable under §1983 to prevent a county from using trust lands for a flood control project. In Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958), an implied right was found under the Interstate Commerce Act, 49 U.S.C. §3(1), to be free from racial discrimination. In Crawford v. Janklow, 710 F.2d 1321 (8th Cir. 1983), an implied right of persons living in subsidized or public housing was found to assistance under the Low Income Home Energy Assistance Act, 42 U.S.C. §§8621-8629.

Association, 453 U.S. 1 (1981), and Wright v. City of Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 93 L.Ed.2d 781 (1987), in which this Court has substantially clarified the availability of §1983 to remedy violations of federal law by agents of the states, subject to only limited exceptions. None of these cases is mentioned, much less analyzed by the Court of Appeals.

In Maine v. Thiboutot, this Court held that §1983 encompassed claims that a state had deprived plaintiffs of benefits secured by the Social Security Act, rejecting arguments that §1983 was intended to provide protection only for violations of civil rights and equal protection laws. 448 U.S. at 6-7:

> The question before us is whether the phrase "and laws," as used in §1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute

> undoubtedly embraces [plaintiffs'] claim that [the state] violated the Social Security Act.
>
> Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the §1983 remedy encompasses violations of federal statutory as well as Constitutional law ....

448 U.S. at 4. See also Monell v. New York City Department of Social Services, 436 U.S. 658, 700-01 (1978):

> [§1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.

(Emphasis added.)

In Pennhurst and Sea Clammers, this Court recognized two exceptions to the broad Maine v. Thiboutot statement concerning the reach of the §1983 phrase, "and laws": the federal laws at issue must

give rise to "enforceable rights"[15] and §1983 is not available if a sufficiently comprehensive enforcement scheme was enacted that it is clear that Congress intended that the remedy be exclusive and recourse to §1983 be foreclosed.[16]

In Roanoke Redevelopment Housing Authority, this Court concluded that the

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[15] In Pennhurst, the federal statute at issue required as a condition of funding that a state provide "adequate assurances" to the Secretary of provision of better service to the developmentally disabled. The Court said that it was an open question "whether an individual's interest in having a state provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of §1983." 451 U.S. at 28. The Court read the specific provisions of the Act as doing no more than expressing a Congressional preference for certain kinds of treatment - at most a "nudge" in the preferred direction," 451 U.S. at 19, and not giving rise to the level of an enforceable right.

[16] In Sea Clammers, the Court found a legislative intention to foreclose resort to §1983 in the comprehensive remedial scheme provided by Congress, a scheme that itself provided for private actions and left no room for additional private remedies under §1983. See also Smith v. Robinson, 468 U.S. 992, 1012 (1984).

Brooke Amendment to the Housing Act of 1937 had not created an enforcement scheme sufficiently definite to warrant the conclusion that Congress had intended to foreclose reliance on §1983. With respect to the Pennhurst "exception," in response to argument that the statute was "too vague and ambiguous" to secure rights under §1983, the Court concluded that the rent ceiling benefits that Congress intended to confer were

> sufficiently specific and definite to qualify as enforceable rights under Pennhurst and §1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce.

93 L.Ed.2d at 793.[17]

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[17] In Roanoke both the district court and the Court of Appeals had concluded that §1983 was unavailable to enforce the Brooke Amendment claim. Prior to the announcement of the Supreme Court's decision, there was clearly substantial doubt as to the existence and scope of the asserted federal right. Nonetheless, this Court concluded that a §1983 claim was presented. If the Court of Appeals holding below were applied to Roanoke, no

No suggestion is made by the court below that the Stevens Treaties can be read to "demonstrate Congressional intent to preclude the remedy of suits under §1983" under the Sea Clammers holding. 453 U.S. at 20. Reliance on the Pennhurst exception is foreclosed by the Court of Appeals concession that "it is not disputed that the Indians had rights under the treaty," 813 F.2d at 1023, and by the Supreme Court's clear holding in Passenger Fishing Vessel that the treaties secure enforceable rights. The rights are certainly "sufficiently specific and definite to qualify as enforceable rights under Pennhurst and §1983." Roanoke, 93

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§1983 claim would have been presented because it precisely fits the circumstance that the Court of Appeals regarded as dispositive, namely: "Just exactly what those rights were was unknown until the Supreme Court decision." 813 F.2d at 1023.

L.Ed.2d at 793.[18] In short, there is no impediment to the enforceability of these "rights secured by the Constitution and laws" under Pennhurst, Sea Clammers or §1983.

The opinion of the Court of Appeals contains no suggestion that its "known and well-delineated" exception does not apply to statutory and constitutional rights, as well as to treaty rights that require judicial interpretation or construction. Statutes and treaties are functional

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[18] In that regard Passenger Fishing Vessel made it explicitly clear that the treaties were specifically intended to "set at rest by law," 443 U.S. 666, n.9, the question of tribal fishing rights. This Court stated that

> the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passed through tribal fishing areas.

443 U.S. at 679. And, regarding the enforceability of the treaty right, this Court also reaffirmed its implicit earlier holdings that the treaties were "self-enforcing." 443 U.S. at 693, n.33.

equivalents under the Supremacy Clause,[19] and no legal basis exists to distinguish between statutes and treaties as "law" for purposes of 42 U.S.C. §1983. The Court of Appeals ruling, therefore, announces a major limitation on the reach of the Maine v. Thiboutot holding for statutory as well as treaty rights. This Court, in Sea Clammers and Pennhurst, has allowed only two well-defined limitations on the reach of §1983 to vindicate deprivations of rights secured by "law" and certiorari should be granted to avoid full-scale dilution of the §1983 remedy.

Alternatively, if the decision below is somehow read to apply uniquely to treaty rights, the protections of §1983 for Indian people will have become severely compromised as to an important

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[19] For example, in the event of a conflict between a treaty and statute, "the last expression of the sovereign will must control." Chae Chan Ping v. United States, 130 U.S. 581 (1889).

class of rights secured by law. As applied to treaties or statutes, rights secured by law do not become unactionable under §1983 simply because they require judicial clarification and interpretation, or can be characterized as not "known and well-delineated" at the outset of the litigation.

2. The Court of Appeals Holding Establishes a De Facto "Good Faith" Immunity for Government Officials in Actions for Declaratory and Injunctive Relief. Such an Exception is An Unwarranted Extension of the Good Faith Qualified Immunity Available for Government Officials in Civil Damages Actions and Conflicts with the Decisions of the Court of Appeals for Other Circuits.

The Court of Appeals decision appears calculated to provide the State with immunity from liability for attorneys' fees on the ground that State officials could not reasonably have been expected to know that they were in violation of the Tribes' treaty rights until those rights were "delineated" or confirmed by the

United States Supreme Court.[20] A qualified "good faith" immunity has been recognized as available for government officials in civil damages actions, see Harlow v. Fitzgerald, 457 U.S. 800 (1982), but in United States v. Washington only injunctive and declaratory relief were sought and obtained.

It is well-established, in the Ninth Circuit and other circuits, that "good faith" is not a defense to an action for declaratory and injunctive relief under

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[20] That creation of "good faith" immunity was intended is suggested by the Court's statement that

> [i]f the State of Washington violates these now known and well-delineated rights, there would be an actual conflict between state and federal law which might give rise to a §1983 action ... That, however, has not yet happened and is not the situation here.

813 F.2d at 1023 (emphasis added). Only after the federal right had been "delineated" by Supreme Court decision does violation of the right become actionable under §1983.

§1983. See Hoohuli v. Ariyoshi, 741 F.2d 1169, 1175 (9th Cir. 1984), "immunity from injunctive relief is generally without foundation." See also Wood v. Strickland, 420 U.S. 308, 315, n.6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well.") See also Beaudett v. City of Hampton, 775 F.2d 1274, 1277 (4th Cir. 1985); Eades v. Sterlinske, 810 F.2d 723, 725 (7th Cir. 1987). Grant of such a qualified immunity is an unwarranted extension of the very limited good faith immunity that applies for civil damages actions.

Further, the legislative history of 42 U.S.C. §1988 makes it explicitly clear that no good faith immunity for awards of attorneys' fees should exist:

> Furthermore, while damages are theoretically available under statutes covered by [§1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage

> remedy. [citing Wood v. Strickland, 420 U.S. 308 (1975).] Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if federal civil and Constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by [§1988] only injunctive relief is sought and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 8. See Hutto v. Finney, 437 U.S. 678, 693 (1978) (holding that neither the Eleventh Amendment nor an official's good faith can bar an award of fees against a state); Pulliam v. Allen, 466 U.S. 522, 543 (1984) (holding that judicial immunity does not bar either prospective injunctive relief or awards of attorneys fees against judges acting in a judicial capacity and confirming Congressional intent in §1988 that immunity doctrine not bar fee awards where

prospective relief is properly awarded).[21]

The potential for a rule requiring appellate clarification as a precondition to §1983 relief to create mischief is vividly illustrated by the circumstances of this case. As this Court made clear in Passenger Fishing Vessel, if any doubt about the content and enforceability of the treaty fishing guarantees of the Stevens Treaties existed, it was only because of the vigor and bitterness of the State's opposition to implementation of those rights.[22] A legal principle that

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[21] Courts have also uniformly recognized that the good faith of public officials is not a "special circumstance" for denial of a fee award. See, e.g., Burke v. Guiney, 700 F.2d 767, 772 (1st Cir. 1983); Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979); Love v. Mayor of Cheyenne, Wyoming, 620 F.2d 235 (10th Cir. 1980); Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979); Larson, Federal Court Awards of Attorneys' Fees 46 (1981) (collecting cases).

[22] See the discussion of the States' "total intransigence" and pattern of resistance to unambiguous treaty language at 15-16, supra.

would allow a civil rights defendant to escape liability for attorneys' fees on the ground that its pattern of relentless opposition to implementation of the federal right somehow rendered the application of that right "uncertain" and therefore outside the scope of §1983, has no place in American jurisprudence and calls for correction by this Court. In any event, creation of this additional immunity is in conflict with the decisions of other Courts of Appeal and this Court; it should therefore be reviewed by a writ of certiorari.

3. The Court of Appeals Holding That the Tribes' Successful Fourteenth Amendment Claims of Denial of Due Process and Equal Protection Fail to Meet the Substantiality Test of Hagans v. Lavine, 415 U.S. 528 (1974), and Cannot Support an Award of Attorneys' Fees, Conflicts In Principle With the Decisions of This Court and With the Legislative History of 42 U.S.C. §1983 and Would Severely Undercut the Availability of Attorneys' Fees in Civil Rights Actions.

As explained in the Statement of the

Case, the Tribes alleged, litigated and prevailed on claims of deprivation of due process and equal protection under color of law by state officials. See particularly CL 1(c), 29, 32, 38, 39, 42, and 43, 384 F. Supp. at 399-404). On appeal the State challenged the district court's interpretation of the Stevens treaties, but not the findings of constitutional deprivation, and those holdings were referred to, 520 F.2d at 683, but not disturbed by the court on appeal. Most importantly, the central holding of United States v. Washington upheld on appeal by this Court, that the State unlawfully discriminated against and rendered "nugatory" the Indians exercise of their treaty-secured property rights, see 443 U.S. at 669, concerned constitutional deprivation.[23] In a dangerous holding of

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[23] The Court of Appeals' recognition that the "Indians had rights under the treaty" which were rendered "nugatory"

broad potential significance to civil rights cases, the court below held that these successful constitutional claims could nevertheless be reclassified as

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by the enforcement of state law, 813 F.2d at 1024, concedes the substantiality of the Tribes' substantive due process claims. State law which discriminates against and renders "nugatory" a federally-secured property right violates substantive due process. In Menominee Tribe v. United States, 391 U.S. 404, 413 (1968), the Supreme Court held that Indian treaty hunting and fishing rights were "property rights" which could not be abrogated by the United States without compensation for loss under the Fifth Amendment. Nullification of such treaty rights does not lose its constitutional status simply because it is the state rather than the federal government which renders the right meaningless. See Chicago, Burlington and Quincy Railroad Co. v. City of Chicago, 166 U.S. 226, (1897); Webbs Fabulous Pharmacies, Inc. v. Becwith, 449 U.S. 155, 159 (1980) (due process protections against taking of property as part of Fourteenth Amendment due process guarantee). See generally Nowak, Rotunda and Young, Constitutional Law, 480-495 (2d ed. 1983) (taking of property is violation of substantive due process). See also Lynch v. Household Finance Corp., 405 U.S. 538, 546 (1972): "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to enjoy, own and dispose of property."

"insubstantial" so as to deny an award of attorneys' fees.[24]

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[24] The district court did more than "make mention," 813 F. 2d at 1024, of equal protection and due process. The Department of Game determination to ban all Indian net fishing on the steelhead runs was held not to "accord . . . treaty Tribes a hearing in conformity with due process of law . . .," 384 F. Supp. at 404 (emphasis added). Various state enforcement practices leading to confiscation or forfeiture of the Tribes' fishing gear and equipment were also held to be "an unlawful deprivation of the rights of said members under the Fourteenth Amendment of the Constitution of the United States and the treaties . . . ." CL 43, id. State regulations were held to be discriminatory and failed to meet substantive and procedural due process standards. 384 F. Supp. at 399-404. See Statement of the Case at 10-14. The Court below acknowledged that State regulations did "discriminate against the Indians," but dismisses the equal protection implications of that holding as based on the Indians' "special entitlement" under the treaties. 813 F.2d at 1024. The Court below cites no authority to support its implied conclusion that discrimination against "special" property rights is not a denial of equal protection. Moreover, state regulations also discriminated in that they totally banned Indian fishing in certain usual and accustomed places while permitting non-Indians to fish on the same runs elsewhere, FF 218, 384 F. Supp. at 218, and in reserving the entire steelhead run for a special interest group -- state-licensed sport fisherman, to the

In Maher v. Gagne, 448 U.S. 122 (1980), this Court held that if a prevailing plaintiff alleged Fourteenth Amendment violations sufficient to support federal court jurisdiction under the test articulated in Hagans v. Lavine, 415 U.S. 528 (1974), that party was entitled to an award of attorneys' fees if he or she prevailed on a pendent claim, even if that claim were a statutory, non-civil rights claim. 448 U.S. at 130-31. This result was explicitly endorsed in the legislative history of the Civil Rights Attorney Fee Awards Act.[25] In Hagans this Court held:

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exclusion of the Indians. CL 39, 384 F. Supp. at 403-04. State law also discriminated between Indians by recognizing the rights of some Tribes but not others, CL 40, 384 F. Supp. at 404.

25 See HR Rep. No. 94-1558, 94th Cong. 2nd Sess. at 3 n.7:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is disposi-

> Claims are constitutionally insubstantial only if . . . prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial. . . . a claim is insubstantial only if "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

415 U.S. at 537-38.

The holding of the court below that successful constitutional claims can become "insubstantial" if not appealed by

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tive. Hagans v. Lavine, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, supra, United Mine Workers v. Gibbs, 383 U.S. 715 (1976), attorneys' fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, supra at 725.

defendants conflicts in principle with Maher v. Gagne and Hagans v. Lavine. Maher v. Gagne allows an award of Attorneys' fees even if the constitutional claims were not litigated at all, and Hagans allows Constitutional claims to be classified as insubstantial only in the narrowest circumstances -- when such claims have been absolutely foreclosed by prior decision.[26]

Like the Court of Appeals ruling

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26 The Tribes did not "abandon" their constitutional claims, 813 F.2d at 1024, simply because the State failed to appeal them. By the same token, it was the State's failure to raise the issue, not the insubstantiality of the claims, that led to the omission of any discussion of Judge Boldt's constitutional deprivation rulings in this Court's 1979 affirmance. Moreover, the State directly and collaterally attacked the central rulings concerning the substance of the treaty rights which were the basis of the Tribes' substantive due process claims that they were deprived of federally-secured property rights without due process of law. Those claims remained in the case and were implicitly decided in the tribes' favor in this Court's 1979 ruling.

concerning the need for Supreme Court delineation to make a federal right actionable under §1983, the court's constitutional insubstantiality holding sanctions a retroactive recharacterization of a civil rights claim, 17 years after the commencement of the lawsuit, so as to deny fees to successful civil rights plaintiffs. The holding creates a dangerous loophole in the protections Congress has mandated for cases involving constitutional rights. Certiorari should be granted to review this loophole created by the Court of Appeals.

CONCLUSION

The decision below would create broad new exceptions to the reach of 42 U.S.C. §1983 and create new limitations on the availability of attorneys fees under 42 U.S.C. §1988. The decision is in conflict with decisions by other Courts of Appeals and is inconsistent with and not supported

by the decisions of this Court. For these reasons, the writ of certiorari should be granted.

Dated this 12th day of January, 1988.

Respectfully submitted,

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Phillip E. Katzen
Attorney for Petitioners

PPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

and

QUINAULT INDIAN TRIBE, et al.,
Plaintiffs-Intervenors-Appellees-Cross-Appellants,

v.

STATE OF WASHINGTON,
Defendant-Appellant-Cross-Appellees.

Nos. 85-3908;
85-4009

D.C. No.
9213-PHASE I 80-2

OPINION

Argued and Submitted
May 8, 1986—Seattle, Washington
Withdrawn from Submission August 22, 1986
Resubmitted September 15, 1986

Filed March 31, 1987

Before: Eugene A. Wright and J. Blaine Anderson, Circuit Judges, and Eugene F. Lynch,* District Judge.

Opinion by Judge Anderson

Appeal from the United States District Court
for the Western District of Washington
Walter E. Craig, District Judge, Presiding

*Honorable Eugene F. Lynch, United States District Judge, Northern District of California, sitting by designation.

SUMMARY

Attorneys' Fees

Appeal from a district court order awarding attorneys' fees and costs under 42 U.S.C. Sec. 1988.

The Quinault Indian Tribe (the Tribe) participated in a suit by the United States against the State of Washington to secure their rights under several Indian treaties to take fish at usual and accustomed grounds and stations in common with the citizens of the territory. In the original action, the U.S. District Court agreed that the Indians were entitled to a 45 to 50% share of the harvestable fish that would at some point pass through recognized tribal fishing grounds. This decision was affirmed by the Ninth Circuit, and the Supreme Court denied certiorari. State regulations developed under this decision were challenged by private citizens in state court, and ultimately the Washington Supreme Court held that the state could not comply with the federal injunction.

The district court entered a series of orders enabling it, directly, with the help of the U.S. Attorney, to supervise and enforce its order. The Ninth Circuit affirmed, but the Supreme Court vacated the judgments of the district court, the Ninth Circuit and the Washington Supreme Court, holding that the Tribes had a right to harvest a share of the fish and that the state prohibition against compliance could not survive the Supremacy Clause. The Tribes' attorneys moved for attorneys' fees against the State of Washington, but the district court found that though such an award would be appropriate under the private attorney general theory, it would be barred by the Eleventh Amendment. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), eliminated the private attorney general theory as a basis for a fee award, but Congress enacted the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. Sec. 1988, which reinstated the private attorney

general theory in actions brought under Civil Rights statutes. The district court later awarded fees of nearly $3 million under Sec. 1988. Washington appeals the award of fees.

[1] The dispositive question is whether the Tribes have stated a claim under 42 U.S.C. Sec. 1983 for which attorneys' fees are available under Sec. 1988. [2] It is apparent that throughout its opinion the Supreme Court was using contract law to make a determination of what rights each parties had to the fish under the treaty. There was no discussion of the state violating the Indians' rights under the treaty or under the Fourteenth Amendment. Although it is not disputed that the Indians had rights, just what those rights were was unknown until the Supreme Court decision. If the state violates those now known and well-delineated rights, there would be an actual conflict between state and federal law which might give rise to a Sec. 1983 action. That has not yet happened and is not the situation here. [3] so the Tribes' treaty interpretation claims do not give rise to a claim cognizable under Sec. 1983, or an award of attorneys' fees under Sec. 1988.

[4] Nor are the Tribes entitled to fees on the basis of pendent Fourteenth Amendment claims pleaded in their original federal complaint, as these do not meet the substantiality test of *Hagans v. Levine*, 415 U.S. 528 (1974), which requires a plaintiff to allege constitutional violations sufficiently substantial to support federal jurisdiction. Any Fourteenth Amendment claims in this case were so attenuated and unsubstantial as to be absolutely devoid of merit. [5] These claims have been asserted in this action solely for the purpose of obtaining fees in an action where civil rights of any kind are at best an afterthought.

COUNSEL

Kenneth O. Eikenberry and David E. Walsh, Olympia, Washington for Defendants-Appellants-Cross-Appellees.

Steven S. Anderson and Phillip E. Katzen, Seattle, Washington for Plaintiffs-Appellees-Cross-Appellants.

OPINION

ANDERSON, Circuit Judge:

The State of Washington appeals from the district court's order awarding attorneys' fees and costs pursuant to 42 U.S.C. § 1988 to appellee Indian tribes ("the Tribes") for participation in *United States v. Washington*.[1] We reverse.

BACKGROUND

The factual background of this appeal is set out more fully in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). In brief, this case began in 1970. The issues concerned the character of the right to take fish under several Indian treaties entered into by the United States and various tribes in 1854 and 1855.[2] The Indians, in return for their relinquishing their interest in certain lands in what is now the State of Washington, were given, among other things, the "right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory." 10 Stat. 1133.

[1] *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *rehearing denied*, 424 U.S. 978 (1976); 459 F.Supp. 1020 (W.D. Wash. 1978), *aff'd sub nom. Puget Sound Gilnetters Ass'n v. U.S. District Court for the Western District of Washington*, 573 F.2d 1123 (9th Cir. 1978), *aff'd in part, vacated in part, and remanded sub nom. Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, *modified*, 444 U.S. 816 (1979).

[2] Treaty of Medicine Creek (10 Stat. 1132); Treaty of Point Elliott (12 Stat. 927); Treaty of Point No Point (12 Stat. 933); Treaty of Neah Bay (12 Stat. 939); Treaty with the Yakamas (12 Stat. 951); and Treaty of Olympia (12 Stat. 971).

The litigation began in a suit by the United States, which sued on its own behalf and on behalf of several Indian tribes, against the State of Washington seeking an interpretation of the treaties and an injunction requiring the State to protect the Indians' share of anadromous fish runs. The district court, in 1974, held that the Indians were entitled to a 45 to 50% share of the harvestable fish that would at some point pass through recognized tribal fishing grounds in a defined area, to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments.[3] The Ninth Circuit affirmed with slight modification,[4] and the United States Supreme Court denied certiorari.[5]

Pursuant to an injunction issued by the district court, the Fisheries Department of Washington adopted regulations protecting the Indians' treaty rights. These regulations were challenged by private citizens in suits filed in Washington State courts. The Washington Supreme Court ultimately held that the Fisheries Department could not comply with the federal injunction, holding, among other things, that the treaties did not give the Indians a right to a share of the fish runs.[6] The district court then entered a series of orders enabling it, directly, with the help of the Washington United States Attorney, to supervise those aspects of the State's fisheries necessary to the preservation of the treaty fishing rights.[7] The Ninth Circuit affirmed,[8] but the United States Supreme Court vacated the judgments of the Ninth Circuit, the district court, and the Washington Supreme Court.[9] The United States

[3]384 F.Supp. 312 (W.D. Wash. 1974).

[4]520 F.2d 676 (9th Cir. 1975)

[5]423 U.S. 1086 (1976) ("*Fishing Vessel*").

[6]*Puget Sound Gillnetters Ass'ns v. Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977); *Fishing Vessel Ass'n v. Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977).

[7]459 F.Supp. 1020 (W.D. Wash. 1978).

[8]573 F.2d 1123 (9th Cir. 1978).

[9]443 U.S. 658 (1979).

Supreme Court held, in pertinent part, that (1) the Indian treaties secured a right to harvest a share of each run of anadromous fish that pass through tribal fishing areas; (2) the harvestable portion of each run should be divided equally into treaty and nontreaty shares and then the treaty share should be reduced if tribal needs could be satisfied with a lesser amount, and (3) the state law prohibition against complying with the district court decree could not survive the Supremacy Clause.

Shortly after the 1974 decision and injunctions were entered, the Tribes' attorneys moved for an award of attorneys' fees pursuant to the private attorney general, bad faith, and the common fund theories. The district court, in September 1974, found that an award would be appropriate under the private attorney general theory, but held that the award was barred by the Eleventh Amendment. While the Tribes' appeal was pending, the United States Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which eliminated the private attorney general theory as a basis for a fee award. The Ninth Circuit then dismissed the appeal and remanded the proceeding "to the district court for a determination in light of *Alyeska* . . . ." (ER p. 19).

Before the case was resubmitted, Congress enacted the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988, which reinstated the private attorney general theory in actions brought under the Civil Rights statutes. No further action regarding the attorneys' fee issue was taken until October 30, 1980 when the Tribes' attorneys filed a renewed motion for an award of attorneys' fees.

In May 1981, the district court ruled that the Tribes had alleged and prevailed upon a cause of action under 42 U.S.C. § 1983 and were therefore entitled to attorneys' fees under § 1988. The court found that the case was pending when § 1988 was enacted, that the original application for attor-

neys' fees was timely filed and remained pending for a decision, that the Eleventh Amendment did not bar recovery for attorneys' fees, and that the Tribes were entitled to an award of attorneys' fees for services rendered in all proceedings within the framework of the case, including appeals. The court then referred the determination of the specific amount of the award to Magistrate John Weinberg.

In his Report and Recommendation, Magistrate Weinberg determined that the Tribal attorneys did exceptionally well in providing documentation for the hours claimed, that all of the hours were reasonably expended, and recommended an award for time claimed in 57 of the 59 proceedings for which the Tribes sought compensation. In calculating the "Lodestar" amount, he recommended that the award should be calculated using an adjusted hourly rate based on prevailing historic rates, adjusted for inflation. In addition, the magistrate recommended no adjustment be made for lost use of money and that no multiplier be awarded. The magistrate's proposed fee award was $2,316,949.96.

The district court adopted the magistrate's recommendations with two exceptions. The court increased the adjustment to the historic hourly rate to reflect both inflation and loss of opportunity. The court also compensated the claimed travel time at 100% of the hourly rate rather than 50% as recommended by the magistrate. The final award ordered by the district court was in the amount of $2,948,770.76. This appeal followed.[10]

[10]Because we reverse the district court's order granting attorneys' fees, we do not reach the merits of the other issues raised in this appeal.

DISCUSSION

A.

[1] The dispositive question in this appeal is whether the Tribes have stated a claim under 42 U.S.C. § 1983[11] for which attorneys' fees are available under 42 U.S.C. § 1988.[12] This is answered by examining the character of the principle question that came before the Supreme Court in *Fishing Vessel*.

There is no doubt that the Supreme Court considered the principle question to be the "*character of th*[*e*] *treaty right* to take fish." *Fishing Vessel*, 443 U.S. at 662 (emphasis added). Indeed, the Supreme Court noted that the litigation commenced when the United States brought suit against Washington seeking an "*interpretation of the treaties*" and an injunction. *Id.* at 670 (emphasis added). After discussing the anadromous fisheries and the treaty negotiations, the Court stated that "[u]nfortunately, that resource [fish] has now become scarce, and the *meaning of the Indians' treaty right* to take fish has accordingly become critical." *Id.* at 669 (emphasis added). In a footnote, the Court stated that "[d]espite our earlier denial of certiorari on the *treaty interpretation issue*, we decline the Government's invitation to treat the matter as

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[11]42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[12]42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976, provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

having been finally adjudicated . . . ." *Id.* at 672 n.19 (emphasis added).

Two of the parties' four original interpretations of the key treaty language were submitted to the Supreme Court. The State of Washington adopted the view that it is merely access to the fishing sites that the treaties secured. The Tribes took the position that they have a right to take whatever quantity they need. *Id.* at 675. The Court used contract law to interpret the treaties since "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Id.* The Court looked to the intent of the parties, as well as previous case law, when it concluded:

> The purport of our cases is clear. Non-treaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

Id. at 680.

[2] It is apparent that throughout the opinion the Supreme Court was making a determination of what exact rights each party had to the fish. As the Court stated, it granted certiorari "to interpret this important treaty provision." *Id.* at 674. There was no discussion of the state violating the Indians' rights under the treaty or under the Fourteenth Amendment. It is not disputed that the Indians had rights under the treaty.

Just exactly what those rights were was unknown until the Supreme Court decision. If the State of Washington violates these now known and well-delineated rights, there would be an actual conflict between state and federal law which might give rise to a § 1983 action. *See White Mountain Apache Tribe v. Williams*, 798 F.2d 1205 (9th Cir. 1985), *as amended by* slip op. at 17 n.8 (9th Cir. Feb. 10, 1987), *cert. denied sub nom. White Mountain Apache Tribe v. Arizona State Transp. Bd.*, 105 S.Ct. 940 (1987). That, however, has not yet happened and is not the situation here.

[3] We therefore hold that the Tribes' treaty interpretation claims do not give rise to a claim cognizable under § 1983. Accordingly, we conclude that such claims do not support an award of attorneys' fees under § 1988.

B.

[4] Nor are the Tribes entitled to fees on the basis of pendent Fourteenth Amendment claims pleaded in their original federal complaint. We hold that the Fourteenth Amendment claims do not meet the substantiality test of *Hagans v. Levine*, 415 U.S. 528 (1974). The *Hagans* substantiality test requires a plaintiff to allege constitutional violations sufficiently substantial to support federal jurisdiction. *Maher v. Gagne*, 448 U.S. 122, 130-31 (1980). In the case at hand, the district court found jurisdiction on four grounds: 28 U.S.C. §§ 1345, 1331, 1343(3) and (4), and 1362. Although § 1345 alone establishes jurisdiction,[13] we hold that any Fourteenth Amendment claims lurking about were "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans*, 415 U.S. at 537. (citations omitted).

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[13] 28 U.S.C. § 1345 (1976) provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Although the district court made mention of "equal protection" and "due process," it was mainly in the sense regarding future state regulations. The district court did find, however, that the present state regulations did discriminate against the Indians, but only in the sense that the state failed to recognize the special entitlement the Indians were to be given. The district court did not hold that the state discriminated for the sake of discrimination—the discrimination was due to the failure to recognize the Indians' special status. *Both* sides appealed to the Ninth Circuit. In our opinion, the Ninth Circuit characterized the relationship between Indians and non-Indians as a cotenancy, discussed the state regulations which it noted appeared sound and commendable, and stated that in treating treaty Indians no differently than other citizens, the state rendered the treaty guarantees nugatory. *United States v. Washington*, 520 F.2d at 685-86. Nowhere did the court hold that the state had violated any Fourteenth Amendment rights. In our second opinion on this matter, we discussed the only equal protection argument presented to it —that treating *Indians* differently from non-Indians in allocating and regulating fish violated basic equal protection principles. The court noted that equal protection is an issue only as it limits the state's regulation of Indian fishing in those areas where the state has a right to regulate. *Puget Sound Gillnetters Ass'n v. U.S. Dist. Court*, 573 F.2d at 1127-28. When the Supreme Court wrote its opinion, equal protection was never mentioned. It appears then that the Indians abandoned their equal protection arguments after the initial complaints and initial district court decision. *See White Mountain*, 798 F.2d at 1215.

[5] We conclude that the Fourteenth Amendment claims fail to meet the substantiality test of *Hagans v. Levine* and have been asserted in this action "solely for the purpose of obtaining fees in [an action] where 'civil rights' of any kind are at best an afterthought." *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting).

CONCLUSION

The underlying issue in this appeal is whether the Tribes stated a claim under § 1983. We hold that they did not. This case deals not with civil or Fourteenth Amendment rights, but with the interpretation of a treaty—a struggle among sovereigns for the "right of taking fish . . . ." 10 Stat. 1133. We therefore reverse the district court's order awarding attorneys' fees.

JUDGMENT REVERSED.

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PENDIX B

ORDER REGARDING
ATTORNEY'S FEES

(May 4,1981)

CRAIG, District Judge.

This Court enters the following order with respect to the Tribes' Renewed Motion for Award of Attorney's Fees:

1. Judge Boldt in his pre-trial order and in Final Decision No. 1 found jurisdiction in Phase I of United States v. Washington under 28 U.S.C. §1343(3) and (4). Pretrial Order paragraph 1(c); United States v. Washington, 384 F.Supp. 312, 399 (W.D.Wash.1974), Conclusion of Law 1c. Section 1343(3) and (4) provides for district court jurisdiction over (1) actions brought to redress any deprivation, under color of state law, of any right, privilege or immunity secured by the Constitution, and (2) actions brought under any Act of Congress

providing for protection of civil rights In United States v. Washington the Tribe alleged, and ultimately prevailed upon, cause of action under 42 U.S.C. §1983, one of the civil rights statutes referre to, in that they alleged and proved deprivations, under color of state law, of "rights, privileges and immunities secured by the Constitution and laws" within the meaning of §1983. See United States v. Washington, Conclusions of Law 38, 39, 40, 41, 42, 43, 44 and 47, 384 F.Supp. at 403-04. Specific citation of 42 U.S.C. §1983 in the complaint or pre-trial order is not necessary in orde to bring the action under the Civil Rights Acts. Paynes v. Lee, 377 F.2d 61, 63 (5th Cir.1967); Holladay v. Roberts, 425 F.Supp. 61, 64 (N.D.Miss. 1977).

[9] 2. Since claims under 42 U.S.C. §1983 are specifically covered by The

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, the Civil Rights Attorney's Fees Awards Act authorizes attorney fees in these proceedings. United States v. Washington was pending at the time that The Civil Rights Attorney's Fees Awards Act of 1976 was enacted and the plaintiff intervenor Tribes are entitled to an award of attorneys' fees for services rendered in United States v. Washington.

3. The application of the plaintiff intervenor Indian Tribes for attorneys' fees in Phase I was filed in a timely manner, and remains pending for decision.

[10] 4. The 11th Amendment is not a bar to a prevailing party plaintiff recovering attorneys' fees from a state under The Civil Rights Attorney's Fees Awards Act. Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522

(1978).

5. As this Court reads Judge Boldt's original decision on the Tribes' motion for attorneys' fees, Judge Boldt rejected the applicability of the "bad faith" rationale for awards of attorneys' fees in 1974. 66 F.R.D. 477 (W.D.Wash.1974). This Court does not disturb Judge Boldt's ruling in that regard.

[11] 6. The plaintiff intervenor Tribes are the prevailing parties in United States v. Washington within the meaning of The Civil Rights Attorney's Fees Awards Act. Plaintiff intervenor Indian Tribes are not entitled to an award of attorneys' fees for participation in cases outside the framework of United States v. Washington, but are entitled to an attorney fee award for the services reasonably necessary to prepare for, try, prosecute and implement the

United States v. Washington decision, including the related appeals to the Ninth Circuit Court of Appeals and the United States Supreme Court.

7. The entitlement of the plaintiff Tribes to attorneys' fees for services rendered in United States v. Washington includes all proceedings within the framework of that case, including appeals, through the remand to the District Court by the Ninth Circuit Court of Appeals pursuant to the United States Supreme Court's mandate in 1979. This Court finds that, prior to this proceeding, there have been no "prevailing parties" within the meaning of The Civil Rights Attorney's Fees Awards Act since the remand to the District Court in 1979.

8. This court finds it appropriate to appoint a special master pursuant to Federal Rule of Civil Procedure 53 to

determine the specific attorney's fee to be awarded to the plaintiff intervenor Tribes under The Civil Rights Attorney's Fees Awards Act of 1976. Accordingly, Magistrate Weinberg, the full-time magistrate for the Western District of Washington at Seattle, is hereby appointed special master. This court, having determined that plaintiff intervenor Tribes are entitled to an award of a reasonable Attorney's Fees pursuant to 42 U.S.C. §1988, therefore refers the matter of determining the specific fee to be awarded to Magistrate Weinberg. Magistrate Weinberg shall mak a recommendation to this Court resolving all issues necessary for the determinatio of the appropriate award. The special master shall determine the total number of compensable hours reasonably spent by tribal attorneys in the preparation,

trial, prosecution and implementation of the United States v. Washington decision and related appeals. The special master shall determine the proceedings for which the Tribes are entitled to recover fees. The special master is given specific instructions to consider the 12 factors adopted by the Ninth Circuit Court of Appeals in Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (1975), and to consider the other appropriate variables utilized by the courts in setting awards under 42 U.S.C. §1988. The special master is further directed to prepare a report recommending to this Court the specific Attorney's Fees to be awarded the Tribes. After Magistrate Weinberg's report is submitted, this Court will set a time for hearing so that all parties will have an opportunity to discuss the validity or invalidity of the Magistrate's

recommendation. (FN6)

FN6. The Magistrate filed his First Report and Recommendation on Phase I Attorneys' Fees on September 24, 1984, infra at 1506. The court signed its Order Awarding Attorney's Fees and Costs on April 30, 1985, infra at 1503.

APPENDIX C

ORDER AWARDING
ATTORNEYS' FEES AND COSTS
(April 30,1985)

CRAIG, District Judge.

The Court has previously determined that the attorneys for the 26 intervening tribes in this proceeding are entitled to an award of reasonable attorneys' fees and costs. The issue of the appropriate amount of such an award was referred to the United States Magistrate for a Report and Recommendation to the Court. The Court has now reviewed the Magistrate's First Report and Recommendation, Second Report and Recommendation, the relevant submissions of the parties, and the balance of the record. The Court has also heard oral argument on the parties' objections to the Magistrate's First Report and Recommendation and Second Report and Recommendation. Having done so, the Court concludes as follows.

APPENDIX C

The Court fully endorses the general approach taken by the Magistrate in computing the recommended award of attorneys' fees. A small number of the Magistrate's specific conclusions or recommendations will be either modified or not adopted by the Court and are discussed more fully below. The Court adopts both the Magistrate's First Report and Recommendation and Second Report and Recommendation to the extent that they are not inconsistent with this Order.

[63][64] The Court concludes that the schedule of historic billing rates recommended by the Magistrate for the period from 1970 through 1974 does not accurately reflect the actual prevailing market rates for similar legal services in the Seattle area during that period. "Reasonable fees" awarded pursuant to 42 U.S.C. §1988 are to be calculated

according to the prevailing market rates in the relevant community for similar services by attorneys of reasonably comparable skill, experience and reputation. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The Tribes' attorneys are entitled to have their fees calculated in accordance with prevailing rates in the community, even if a lower rate was prescribed in a contract executed by their client. Blum v. Stenson, supra; Tasby v. Wright, 550 F.Supp. 262 (D.Tex.1982). After reviewing the various relevant affidavits and documents submitted to the Court, the Court concludes that the schedule of rates prepared by economic consultant John L. Finch from data contained in the annual Cantor study most accurately reflects the prevailing rates for comparable legal services in the

APPENDIX C

Seattle area during the period 1970-1974. With respect to legal services provided during the period from 1975 through 1982, the Court adopts the schedule of historic rates recommended by the Magistrate. The Court finds that the Magistrate's recommended schedule accurately reflects the prevailing rates for comparable legal services in the Seattle area during that period.

The Court also finds that the applicable historic billing rates should be adjusted upward to compensate for the loss of use of the funds over the years as well as for the effects of inflation. See Burgess v. Premier Corp., 727 F.2d 826, 841 (9th Cir.1984). The Court concludes that the upward adjustment should be based on the yield on 52-week U.S. Treasury Bills. Such an adjustment will operate to compensate for both the loss of use of the

APPENDIX C

funds and the effects of inflation and will do so at a conservative rate of interest. Accordingly, the Court adopts the following schedule of adjusted billing rates for all applicable years. This schedule is based on the schedules of historic billing rates adopted by the Court in the preceding paragraph.

Work Done In	Admit to bar Before 1960	Admit to Bar Before 1970	Admit 70-72	Admit 73-76	Admit 77-Present
1970	163.13	138.03	125.48		
1971	157.50	133.04	121.31		
1972	161.72	136.85	124.42		
1973	150.67	127.47	115.90	92.70	
1974	151.26	127.98	116.36	93.09	
1975	155.52	131.60	119.63	95.71	
1976	169.40	146.81	124.23	101.64	
1977	170.39	149.09	127.79	117.14	95.84
1978	176.97	157.31	137.65	117.98	98.32
1979	177.36	159.63	141.89	124.15	97.55
1980	174.15	158.32	142.49	126.66	102.91

APPENDIX C

1981	164.98	151.23	137.49	123.74	103.11
1982	158.88	146.66	134.44	122.21	103.88

The Court has computed the total compensable hours for each attorney for each year that such attorney expended compensable time in these proceedings. These totals were then multiplied by the applicable adjusted billing rates and added to arrive at a total award.

The Court also concludes that the attorneys' travel time should be compensated at the otherwise applicable rate, without reduction. See Henry v. Webermeier, 738 F.2d 188, 194 (7th Cir.1984). Pursuant to the direction of the Magistrate, the Tribes' attorneys prepared a summary of the compensable hours and the applicable rates that would be applied if the Court adopted the First Report and Recommendation. In preparing

that summary, the attorneys reduced the number of travel hours by one-half, and billed them at the full applicable rate. Such procedure was suggested by the Magistrate for ease of computation. As the Court concludes that travel time should be compensated at the full applicable rate, the Court has added the previously deducted travel time back to the applicable yearly totals of compensable hours prior to the application of the applicable adjusted billing rates.

The Tribes' attorneys originally submitted a detailed claim for costs totalling $87,883.19. The parties subsequently reached a negotiated stipulation which provided that the claim for costs would be reduced in the same proportion as the Court's reduction in the number of compensable hours. In accordance with that stipulation, the

APPENDIX C

Court has awarded costs in an amount that exceeds the amount recommended by the Magistrate in the same proportion that the Court's ruling on compensable hours exceeds the number of compensable hours recommended by the Magistrate.

It is therefore ORDERED:

[65] (1) The Court awards attorneys' fees and costs as follows:

Recipient	Attorneys' Fees	Costs	Total Award
Ever-green Legal Services	$1,181,275.14		1,181,275.14
Native American Rights Fund	454,388.39	12,867.64	467,256.03
Ziontz, Pirtle Law Firm	765,970.10	61,843.00	827,813.10
James Hovis	221,072.52	6,379.11	227,451.63
John H. Bell (Clinebell)	175,367.68		175,367.68

APPENDIX C

Bell & Ingram (For services of Lewis Bell, deceased)	50,217.21		50,217.21
Michael R. Thorp	3,831.30		3,831.30
Susan Kay Hvalsoe	15,558.17		15,558.17
Total	$ 2,867,681.01	81,089.75	2,948,770.76

(2) The Court adopts both the Magistrate's First Report and Recommendation and Second Report and Recommendation to the extent that they are not inconsistent with this Order.

(3) Each award shall be payable forthwith by the State of Washington to the firms or individuals listed. These awards shall constitute judgments of the Court, and each shall bear interest at the rate applicable to such judgments, from the date that this Order is filed until the date paid.

(4) To the extent that a Tribe has

already paid fees to its attorneys for time the Court finds compensable, the Tribe will become entitled to a refund when this award is paid. This refund shall be in the amount of fees actually paid by the Tribe, adjusted upward to reflect inflation from the date the fee was paid by the Tribe to the date of this Order, in the same manner as the fee award itself. The refund shall bear interest after the date of this Order at the same rate(s) as the awards. The Tribes' attorneys shall pay such refunds to the Tribes within thirty (30) days after the State pays the fee awards. In the event of a dispute as to a refund, the Tribe's attorney shall present the matter to the Court for resolution within sixty (60) days after the State pays the fee award.

(5) To the extent that the Tribes have already reimbursed their attorneys for, or

paid directly, costs covered by this Court's award, the Tribes are entitled to an award of costs. Attorneys who have advanced costs for their clients are entitled to an award of costs only to the extent that they have not been reimbursed by their clients for costs advanced. The attorneys are therefore directed to negotiate with their clients a written agreement reflecting the appropriate division of costs. A copy shall be served on the State, filed with this Court, and shall not be effective until approved by this Court. The costs awarded by this Court shall be paid to the attorneys filing the cost claim, but shall be held in the attorneys' interest-bearing trust account until such time as the cost agreement described above is approved by the Court. At that time reimbursement of the Tribes for their share shall be made

promptly.

(6) The Clerk shall direct copies of this Order in accordance with the Phase I distribution list, and to every attorney or firm listed as entitled to an award of attorneys' fees.

APPENDIX D

MAGISTRATE'S FIRST REPORT AND RECOMMENDATION ON PHASE I ATTORNEYS' FEES (September 21, 1984)

JOHN L. WEINBERG, United States Magistrate.

I. INTRODUCTION

The court has previously determined that the attorneys for the 26 intervening Tribes in Phase I ("the Tribal attorneys") are entitled to an award of reasonable attorneys' fees and costs, to be paid by the State of Washington and other defendants ("the State"). The court has ruled that, because the Tribes were "prevailing parties," their attorneys are entitled to such an award under the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988.

In a series of Orders of Reference, the court has referred to the United States Magistrate, for recommendation, the issue of the appropriate amounts of the awards

to the 29 Tribal attorneys who have applied. This requires detailed findings as to the extent of the legal services performed by each attorney, and the fair and reasonable value of those services, in light of rapidly changing case law interpreting and applying §1988. The court has also referred the issue of an award of costs.

The Tribal attorneys have submitted extensive documentation of the time they devoted to this case between 1970 and 1982, prevailing hourly rules for legal services, information as to their professional credentials, and other related materials. The State has conducted limited discovery. Both the Tribal attorneys and the State have thoroughly briefed and argued all issues relating to the award. The United States, which is not entitled to attorneys' fees

under §1988, has declined to participate in the proceeding, except to provide some information requested by other parties.

The Tribal attorneys have revised their claims in many respects since their first submission. These revisions reflect changes in prevailing rates, waivers of some hours originally claimed, different multiplier claims in light of changing case law, and other changes. They now seek compensation for a total of almost 24,000 hours. They request total fees of either $3,737,000, if the court uses "historic" hourly rates, or $4,333,000, if the court uses "current" rates.

The response to the court's Orders of Reference will consist of a First and a Second Report and Recommendation, and a proposed Order. This First Report and Recommendation sets forth proposed determinations of the legal and factual

issues which must be resolved before awards can be computed. It is contemplated that the parties, perhaps with further guidance, can then compute the specific awards which would result if the court were to adopt those determinations of the issues. The Second Report and Recommendation would then propose those specific awards, and be accompanied by a proposed order. The matter will be ready for final action by the court when all of those documents, and the parties' responses, are before it.

This is not the first ruling, within this complex case, upon an application for attorneys' fees by attorneys for the Tribes. The Hon. William H. Orrick, Jr., has awarded attorneys' fees in Phase II of this case, by orders filed December 18, 1981 and October 16, 1982. In doing so, Judge Orrick ruled upon many of the same

and similar issues as are presented by this Phase I application. His rulings are discussed below. In almost all respects, this First Report and Recommendation suggests the same or similar rulings in Phase I. In a few respects, however, it is respectfully submitted that the circumstances suggest a different conclusion.

The court, at this time, is passing upon all claims for attorneys' fees and costs in Phase I through February 12, 1982, with the exception of claims for time and expense in seeking an award of attorneys' fees. Claims for fees and costs for several matters arising after February 12, 1982 remain pending for later determination. The court's rulings on the issues involved in this application will provide a framework for resolution of those later claims.

APPENDIX D

II. SUMMARY OF CONCLUSIONS

For the reasons discussed more fully below, the court should reach the following conclusions:

(1) The court's general approach to fixing fee awards should be use of the "lodestar" analysis, with modifications as required in light of the Johnson/Kerr factors.

(2) The court should award compensation for all of the time claimed by the Tribal attorneys, with only these exceptions: time devoted to seeking fees; Federal Task Force proceedings; amicus participation in state court cases; motion to disqualify Judge Boldt; time miscoded to the Mukkaw Bay dispute; and 50% of the time classified either as "Miscellaneous; General Advice and Meetings with Client," or by Ziontz firm attorneys as "Non-Designated Time."

(3) With the exception of the last two categories listed above, the Tribal attorneys have adequately documented their time, despite the absence of contemporaneous records for some of that time.

(4) The Tribal attorneys have demonstrated that the hours devoted to the case, while extensive, were reasonably expended, under all the circumstances. The State's challenges in this regard are not persuasive.

(5) Compensation should be based upon the rates prevailing at the time the services were performed ("historic rates"), not upon rates prevailing at the time the court makes the fee award ("current rates"). The Tribal attorneys are entitled to have the historic rates enhanced, however, in proportion to the Consumer Price Index, to compensate both

for inflation and for delay in receiving payment.

(6) For time devoted to performing legal services, the court should adopt and use the historic hourly rates proposed by the Tribal attorneys. They have adequately documented those rates, and the State has not challenged them. For time spent in travel, however, the court should compensate the Tribal attorneys at a rate half of that applicable to performing legal services.

(7) Except for the inflation adjustment described in (5) above, the court should not apply a "multiplier" to the fee award in this case.

(8) The Tribes are entitled to an award of costs in the amount claimed, with a reduction proportional to disallowed attorneys' hours, in accordance with the agreement of the parties. Before entering

the award of costs, the court should require the Tribes and the Tribal attorneys to enter into a written agreement governing division of the award.

(9) This court's awards of fees and costs should be entered as judgments of this court. Each award shall bear interest at the rate applicable to such judgments, from the date of the award until the date paid. The amounts of refunds are to be increased at the same rate.

(10) To the extent Tribes have already paid fees to their attorneys for time the court finds compensable, the Tribes are entitled to refunds. Those refunds should consist of the actual amount originally paid, adjusted until the date of the award in proportion to changes in the Consumer Price Index. The refunds should be made within 30 days after the State pays the

fee award.

III. GENERAL APPROACH

In its "Order Regarding Attorney's Fees," filed May 8, 1981, the court specifically instructed the special master,

> "... to consider the 12 factors adopted by the Ninth Circuit Court of Appeals in Kerr v. Screen Extras Guild, 526 F.2d 67, 70, and to consider the other appropriate variables utilized by the courts in setting awards under 42 U.S.C. §1988."

Since the entry of that order, there has been extensive federal litigation concerning fee awards under §1988. Of particular import are two recent decisions of the United States Supreme Court: Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) and Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

It is still appropriate to consider the Kerr standards, which are based upon

APPENDIX D

Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir.1974). But in Hensley, the United States Supreme Court indicated the district courts should apply those factors in the context of a somewhat different approach to the award of fees, known as the "lodestar" analysis:

> "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."

103 S.Ct. at 1939.

This product constitutes the "lodestar," which can then be adjusted upward or downward under certain limited circumstances. The "lodestar" analysis is frequently associated with the decisions of the Third Circuit in Lindy Bros v. American Radiator, 487 F.2d 161 (3d Cir.1973) ("Lindy I "), and its successor case, Lindy II, 540 F.2d 102 (3d Cir.1976).

APPENDIX D

The Supreme Court recommended, in Hensley, an integrated use of the two approaches. Many of the Johnson/Kerr factors, the Court held,

> "... usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."

103 S.Ct. at 1940, n. 9.

Other Johnson/Kerr factors may lead the district court to adjust the fee upward or downward. Id.

In several cases prior to Hensley, including Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 840 (9th Cir.1982), the Ninth Circuit approved a fee-setting procedure which blends the best features of the Kerr and lodestar approaches. This "blended" approach has been the technique used in the presentations of the parties, and in this First Report and Recommendation.

The first task is to determine the

number of compensable hours. In this case, this requires consideration of a number of the Johnson/Kerr factors, and several other determinations, including:

(1) For which sub-proceedings are the Tribal attorneys entitled to recover fees at all?

(2) Have they adequately documented the number of hours claimed?

(3) Was the number of hours reasonable? Or was there unnecessary duplication of time, with attorneys for other Tribes or for the United States?

Secondly, the court must determine reasonable hourly rates. In addition to applying the relevant Johnson/Kerr factors, the court must consider the claims of the Tribal attorneys to compensation for the substantial delay between when the fee was earned and the

award. The court must also determine whether some hours (e.g. travel) should be compensated at different rates.

Third, the court must resolve the claim for application of a "multiplier" to the lodestar amount.

Fourth, the Tribal attorneys are entitled to an award of costs, in an amount determined by the court.

Finally, where clients have already paid fees and/or costs, the court must direct an appropriate refund.

The balance of this First Report and Recommendation is devoted to those five subjects.

IV. COMPENSABLE HOURS

A. Generally.

Twenty-nine Tribal attorneys claim compensation for a total of 23,980.35 hours during 1970-1982, inclusive. They have documented their claims with

extensive affidavits and, where available, with copies of their time sheets and other contemporaneous records.

The Tribal attorneys have designated two of their number, Messrs. Katzen and Anderson, as lead counsel for purposes of the claim for fees. They have submitted a series of "Summaries" of the claims, making revisions as required by further analysis and developing case law. For purposes of determining the number of compensable hours, the court should refer to the most recent revision, captioned "Revised Summary of Attorney's Fee Claim for Phase I of U.S. v. Washington, Using Current Rates," filed June 30, 1984.

Under Hensley and Blum, consideration of at least three of the Kerr/Johnson factors is "subsumed" within the calculation of hours reasonably expended. Those are the factors numbered (1), (2) and (8):

(1) the time and labor required;

(2) the novelty and difficulty of the questions involved;

and

(8) the amount involved and the result obtained.

The court considers and gives effect to the first of these factors when it arrives at a fee award based upon the compensable hours and supporting documentation submitted by counsel. The other two factors are discussed below.

In setting the number of compensable hours, the court in this case must address these basic questions: (1) For which activities, or "sub-proceedings," are claimants entitled to compensation? (2) Have they adequately documented their hours? (3) Were the hours reasonably expended?

B. <u>For Which Sub-Proceedings?</u>

APPENDIX D

To assist in the analysis, counsel have identified 65 separate phases of the case, or "sub-proceedings," during the 13 years in question. They have numbered these sub-proceedings "1" to "65" consecutively, and have described them in their "Narratives" and "Counter-Narratives." In addition, they have identified nine other categories of work which do not fit neatly into any of the 65 categories. These are labelled "A" through "I," and described in the narratives. Finally, the attorneys from the Ziontz firm have listed some of their time as "Non-Designated Time." The Tribal attorneys seek compensation for time allocated to 59 of these 75 categories. The State contests all but a few.

In its "Order Regarding Attorneys Fees" filed May 8, 1982, paragraph 6, this court found the Tribes were prevailing parties,

APPENDIX D

and

> "... entitled to an attorney fee award for the services reasonably necessary to prepare for, try, prosecute and implement the United States v. Washington decision, including the related appeals...."

The court denied any award, however, for "participation" in cases outside the framework of United States v. Washington. Other guidance as to which sub-proceedings are compensable comes from the Supreme Court in Hensley and from the Courts of Appeals, as discussed below.

We turn, therefore, to the specific sub-proceedings comprising the claim by the Tribal attorneys.

Undisputed Sub-Proceedings. First, the State does not contest the claims that time in each of the following sub-proceedings is compensable:

No. 2 Filing, Pre-Trial and Trial of United States v. Washington

No. 3 Final Decision No. 1

APPENDIX D

No. 4 Requests for Reconsideration and Amendment of Rulings

No. 6 Appeals from Final Decision No. 1 and Related Rulings

No. 45 (except for portions discussed below) 1977 Allocation Orders and Enforcement Proceedings

No. 58 Remand from United States Supreme Court

No. E Direct Settlement Negotiations

No. G Nisqually Joint Enforcement

The court should grant compensation for time claimed in these sub-proceedings.

Time Devoted to Seeking Fees. Secondly, the parties have agreed to defer the award of any compensation for time devoted to seeking an award of attorneys' fees. The court therefore should eliminate, without prejudice, time claimed in sub-proceeding No. 4A.

Unsuccessful Claims. One challenge

presented by the State is to the Tribal attorneys' time in several sub-proceedings in which the Tribes were not the "prevailing parties." Unfortunately, the test is not that simple in determining whether time spent on an unsuccessful claim is compensable. The court must also consider the extent to which the claim was related to the principal claim or objective in the case; and also the overall success of plaintiff in the litigation. The Supreme Court explored these principles in Hensley.

[66] A party is not entitled to fees incurred in connection with unsuccessful claims which are unrelated to the basic claim. Hensley, at 103 S.Ct. at 1940. But the Tribal attorneys assert they do not claim fees, or have abandoned their claims, to any sub-proceedings which would fit this description. The record bears

this out.

[67] One of the principal holdings in Hensley, however, is that where a claim is unsuccessful, but is closely related to the basic, successful claim in the case, the degree of success obtained overall determines whether hours expended on the unsuccessful claim are compensable. If the plaintiff has achieved "excellent results," and his overall success is exceptional, his attorney should recover a fully compensatory fee.

[68] The Tribes' success in this case fits that description. They have been overwhelmingly successful on their various claims. While they have not prevailed on every position, they prevailed on their basic claims as to treaty rights, and in the vast majority of the proceedings to interpret, implement, and enforce the court's original decision. Accordingly,

their attorneys are also entitled to compensation for time spent on related claims which were unsuccessful, wholly or in part.

In the sub-proceedings listed below, the Tribes were wholly or partially unsuccessful. But because the claims were related to successful claims, the Tribal attorneys are nevertheless entitled to full compensation for their time:

Nos. 13, 15 & 28 Chum Fishing Closures

No. 45 (parts) The Tribes unsuccessfully resisted the petition for certiorari, and lost on a few, relatively minor issues in the United States Supreme Court.

[69] Related Claims Never Adjudicated. Furthermore, because the Tribal attorneys are entitled to fees in sub-proceedings where the court ruled against them, they necessarily are entitled to fees in

APPENDIX D

sub-proceedings that were begun within the framework of U.S. v. Washington, but never reached adjudication. This occurred occasionally, for example, because later events rendered an issue moot; or because the court did not rule on an issue and no party pursued it. Again, the Tribal attorneys are entitled to full compensation in those sub-proceedings. They include:

Nos. 9, 23 & 37 I.P.S.F.C. Proceedings

No. 18 State Exclusion of Green River Hatchery-Origin Steelhead from the Treaty Share

No. 36 State Interference With Makah Fish Purchasers

No. 41 1976 Chum Runs

No. 46 Washington's Rule 60(b) Motion for Modification of Final Decision No. 1

No. 57(a) Nisqually River Injunction

[70] Settled Matters. By the same token, the Tribal attorneys are entitled to full compensation for time devoted to sub-proceedings which were within the framework of the case and related to their basic claims, but were settled between the parties prior to adjudication. This is another instance where a plaintiff need not show he prevailed on a specific claim or sub-proceeding to be entitled to recover attorneys' fees. Entitlement to attorneys' fees on settled issues is confirmed by the recent decision of the Ninth Circuit in Lummi Indian Tribe v. Oltman, 720 F.2d 1124 (9th Cir. 1983). There is an additional policy reason strongly supporting recovery of fees on issues that are settled. If the Tribes were barred from recovering fees on settled issues or sub-proceedings, this would inject a strong disincentive to

resolve matters by agreement. The Tribal attorneys would be encouraged to press every issue to an adjudication, to enable them to recover their fees.

The Tribal attorneys are therefore entitled to be fully compensated for their time in these sub-proceedings, which were entirely or substantially resolved by agreement:

No. 11 Requests for Determination Re Fishing Gear Return and Damages

No. 27 Notice Required Prior to Enforcement of State Regulations

No. 30 Certain Questions Re Salmon Fisheries Management

No. 32 Establishment of Fisheries Advisory Board and Procedures for State Emergency Regulations

No. 33 Salmon Catch Report Methodology

No. 34 Adoption of Salmon Management Plan

APPENDIX D

No. 38 Steelhead Management Questions

[71] Sub-proceedings to Implement or Enforce Decision. As earlier noted, this court explicitly found that the Tribal attorneys are entitled to recover for the time reasonably spent to "implement" this court's decision. The same considerations apply to those sub-proceedings designed to "enforce" the decision. This is consistent with general case law in this area, including the recent decision of the Ninth Circuit in Rutherford v. Pitchess, 713 F.2d 1416 (9th Cir.1983).

The Tribal attorneys are entitled to full compensation for their time in each of the following sub-proceedings, because each directly involved implementation and enforcement of this court's decision:

No. 7 Appointment of Fisheries Expert (1974, 1979)

No. 10 Motion re Certain Nisqually

APPENDIX D

River Fishing

Nos. 12 & B The Program to Implement the Interim Plan

No. 14 Quinault Fisheries in Grays Harbor

No. 39 1976 Coho Fishery

No. 48 Judicial Enforcement Via Contempt for 1978 and Subsequent Seasons

No. 50 Salmon Allocation Order for 1978 and Subsequent Seasons

No. 53 1978-79 Proceedings in Aid of Federal Enforcement

No. 57(b) & (c) Coastal Rivers Management Schedule (1978), and Puget Sound Coho (1979)

No. H Development of Tribal Ordinances

[72] Where State Did Not Actively Contest. In another category of sub-proceedings, the State challenges the claims because the State was not directly

involved, or did not actively contest the positions advanced by the Tribes. The State asserts this was true, for example, in certain proceedings to determine the treaty status of a tribe, or its usual and accustomed fishing grounds, or the boundaries of its reservation.

The proper focus, however, should not be on the question of whether the State opposed the Tribal position, or even participated in the sub-proceeding. The issues, instead, are whether the proceeding was a necessary step in implementing the court's decision; and whether it was reasonable, on the part of the Tribal counsel, to initiate and pursue the matter, and to devote the amount of time claimed.

Measured against this test, the Tribal attorneys are entitled to compensation for the sub-proceedings challenged on this

basis. Their Tribes can secure the benefits of the treaty rights declared by the court only if the court is satisfied as to such matters as treaty status and fishing grounds. This is the mechanism by which abstract treaty rights become translated into the opportunity for specific Tribes to fish in specific locations. Indeed, in the absence of such showing, treaty fishermen would be subject to arrest and prosecution by the State. Establishing those matters to the court's satisfaction was therefore a crucial part of securing complete relief. The fact that the State did not contest the issue actively, or even at all, is not relevant. The Tribal attorneys are entitled to full compensation in these sub-proceedings:

No. 5 Intervention of Additional Parties (1974-75)

No. 16 Treaty Status and Usual and

APPENDIX D

Accustomed Fishing Places of Certain Reservation Tribes

No. 61 Treaty Status of Jamestown Klallam Tribe

No. 62 Usual and Accustomed Fishing Areas of the Puyallup, Squaxin Island and Nisqually Tribes in the Carr Inlet Area

No. F Reservation Boundaries

[73] Responding to Court's Request. For similar reasons, the Tribal attorneys are entitled to compensation for the eleven hours claimed in sub-proceeding, No. 52. They expended this time in responding to a request by the court to list all open and pending matters, and to describe the status of each. This itself was not a contested issue on the merits. But the court has little choice but to find that it was reasonable, on the part of the Tribal attorneys, to expend time preparing

a full and careful response to the court's inquiry. The Tribal attorneys are entitled to compensation for that time, despite the fact that it was not devoted to an issue contested by the State.

Appeal Pending. The State objected to the claim of the Tribal attorneys with respect to No. 60, Allocation of Quinault River Steelhead, because the State's appeal was still pending. Claimants contend that is not a proper basis for disallowing the claim. In any event, the appeal has now been decided, adversely to the State. Claimants are entitled to compensation on No. 60.

Opposition Without Merit. On seven sub-proceedings, the State seems to interpose objections in its "Counter-Narrative." But those objections are unclear in nature, and/or without merit on their face. Claimants are

entitled to compensation in:

No. 24 1975 Coho Salmon Runs

No. 31 State Buy-Back Program Applicability to Treaty Fishermen

No. 51 1978 Strait of Juan de Fuca Chum Salmon Fisheries

No. 55 Chinook Minimum Size Limit Regulations

No. 63 Department of Fisheries TRO Request RE: Hoh River Coho

No. 64 Nisqually Tribe's TRO Request RE: Nisqually River Chum Fishery

No. 65 Miscellaneous 1981 and 1982 Proceeding

Herring. Sub-proceedings Nos. 8, 20 and 25 involved determination of the rules applicable to herring fisheries. The State requested determinations of these issues within the framework of U.S. v. Washington; and the court resolved them in favor of the Tribes, interpreting and

perhaps extending the original decision (No. 25 was essentially settled). The Tribal attorneys are entitled to compensation, despite the fact that the original decision primarily concerned salmon and steelhead, and did not address questions of entitlement to herring.

Sub-Proceedings Outside The Framework of U.S. v. Washington. As noted above, this court has already ruled that the Tribal attorneys are not entitled to compensation for time expended in cases "outside the framework of U.S. v. Washington." In view of this limitation, the Tribal attorneys have already withheld claims for time for certain activities, such as legislative activities on behalf of the Tribes (sub-proceeding No. A). But the court should also disallow compensation for time devoted to two other sub-proceedings: No. 43, Federal Task Force negotiations; and

the small portion of the claim in No. 45 which related to amicus participation by the Tribes in state court cases.

[74] The administration of President Jimmy Carter, at the urging of the Washington congressional delegation, undertook in 1977 the ambitious project of negotiating a settlement of the entire range of issues concerning Treaty fishing rights in the Pacific Northwest. The President established a high level task force, to gather information, meet with the parties, develop proposed lines of action, and ultimately to negotiate solutions to the hotly disputed and time-consuming problems of Treaty fishing rights.

The history and proceedings of the Task Force are summarized at some length at pages 75-81 of a special report in June of 1981 by the U.S. Commission on Civil

Rights, entitled "Indian Tribes: A Continuing Quest For Survival." This report is included as part of the record as Attachment E to the Tribes' memorandum filed November 25, 1981. It therefore need not be repeated here.

For present purposes, however, these facts are significant. The Tribal attorneys (and, no doubt, the State) expended many hours preparing their various submissions to the Federal Task Force. Eventually, the Task Force developed a comprehensive set of proposals, which were described by the Civil Rights Commission as,

> "not an attempt to implement the court decision, but rather an attempt to replace the guarantees of the treaties, as determined by the court, with a completely different fishery management and distribution scheme." (p. 78).

This led to extensive negotiations. In the end, the proposals of the Task Force

were rejected by both sides.

The Tribal attorneys actively participated and represented the Tribes throughout this process. They now claim compensation for 1,065.15 hours of time expended in this connection. This represents the third largest claim among the 75 sub-proceedings.

This claim presents a close issue, with compelling arguments on both sides. Many (but not all) of the matters at stake in the Task Force negotiations were issues involved in this case. If the court must compensate the Tribal attorneys for time spent in negotiations to settle those issues within the case, it seems reasonable to compensate them for negotiation of the same issues outside the case.

On the other hand, the Federal Task Force proceedings were entirely outside

the "framework of U.S. v. Washington." This court had no role in initiating, supervising or terminating the negotiations arising from the work of the Task Force. While much of the subject matter was the same, the Task Force proceedings were essentially a completely different forum for the dispute from U.S. v. Washington. The Task Force recommend solutions entirely different from an implementation of the court's decision.

In light of the court's directive to allow compensation only for time spent within the framework of this case, I recommend the court disallow compensation for the time of the Tribal attorneys in Federal Task Force proceedings, No. 43.

[75] A similar, but seemingly easier, question arises as to participation by the Tribes as amicus curiae in cases on related issues in state courts. It

likewise was not participation within the framework of U.S. v. Washington. Unlike Bartholomew v. Watson, 665 F.2d 910 (9th Cir.1982), this is not a case where bringing the state court action was an essential step for plaintiffs before they could pursue their federal s 1983 claim. While the state cases related to the same subject matter, there is no showing that participation by the Tribes was essential to preserving the benefits secured in this case. The Tribes did not initiate these state court cases. Indeed, they refused to participate as parties, limiting their role instead to that of amici. Furthermore, the United States also participated in the state court cases, taking positions essentially consistent with those of the Tribes. This provides further support for concluding that there is no showing that amicus participation by

the Tribes was necessary to protect their interests.

The court should disallow those portions of the claim in No. 45 which relate to participation as amici in state court proceedings.

Disqualification of Judge Boldt. The court should disallow the claim for time devoted to resisting the State's motion to disqualify Judge George H. Boldt (sub-proceeding no. C). The motion was directed to Judge Boldt's participation in Phase II. Counsel generally applied for, and were granted compensation for this time in the Phase II attorneys' fees proceedings before Judge Orrick. There is no indication the same time is covered by the present request. But at oral argument, counsel for the Tribal attorneys candidly stated that "inadvertence" was probably the reason the time claimed here

was omitted from the Phase II claim.

The proper place to seek compensation for time devoted to the disqualification motion is in the Phase II proceeding. The court should disallow the time claimed in sub-proceeding "C."

Time Erroneously Classified. The tribal attorneys are entitled to compensation for time reasonably expended in relation to the dispute in 1981 relating to Mukkaw Set Net Fishing, no. 59. The State challenges some of the time claimed under this heading, however, pointing out that Mason Morisset claimed time supposedly spent in 1977 and 1979 on this 1981 dispute. The Tribal attorneys have not explained this discrepancy.

An examination of Mr. Morisset's time sheets, however, provides the explanation. The 19.8 hours he spent in 1981 on this issue was erroneously listed under 1979 in

the summary. He is entitled to compensation to this time. On the other hand, he devoted 8.1 hours in 1977 to the motion to disqualify Judge Boldt. This time, which is not compensable, was erroneously coded for inclusion in sub-proceeding no. 59, Mukkaw Set Net Fishing.

The State presents no persuasive challenge to the documented claims of attorneys Sam Stiltner and Frank R. Jozwiak on this issue.

In summary, the Tribal attorneys are entitled to full compensation on their claims for sub-proceeding no. 59, except for 8.1 hours claimed by Mr. Morisset.

Time Not Documented as to Subject Matter. Finally, there are two sub-categories of time as to which the Tribal attorneys have been unable to specify the subject matter of their work.

APPENDIX D

Category "I" is entitled, "Miscellaneous; General Advice and Meetings with Clients." Four attorneys claim a total of 507.6 hours, from 1973 through 1982. As to this time, the attorneys apparently can document that they conferred with their Tribal clients, but cannot identify the subject matter of the discussions. They are therefore unable to allocate the time to any of the other 73 sub-proceedings.

Similarly, four attorneys from the Ziontz firm claim compensation for a total of 477.6 additional hours. About two-thirds of this time is claimed by Mason Morisset. The summary identifies this un-numbered category simply as "Non-Designated Time." The attorneys apparently can establish from their time records that this time was spent in connection with U.S. v. Washington, and

generally how it was spent (e.g. reviewing and analyzing pleadings, tribal regulations, meetings, telephone conversations, etc.). But again, counsel apparently cannot specify the particular subject matter involved. These hours are therefore "non-designated," as they cannot be included in any of the specific sub-proceedings.

The Tribal attorneys assert they are entitled to full compensation for their time in these two categories because their detailed time records are sufficiently specific, even if the "summary" is not. But this argument falls short. The time records establish which attorneys devoted this time on which dates, and in a general way their activity during those hours. But the burden on the Tribal attorneys goes further. They are required to establish their time was devoted to a

subject matter as to which they are entitled to compensation. Furthermore, they must show their time was "reasonably" spent. This determination is very difficult if the subject matter of their work is unknown. Despite these facts, disallowing all of this time, which totals about 1,000 hours, would be unfair to the Tribal attorneys. Under these recommendations, the court would award compensation for all hours claimed in over two-thirds of all identified sub-proceedings; and would find the Tribal attorneys have demonstrated all of their time was reasonably spent. It therefore seems very likely that, if the Tribal attorneys had kept more detailed time records as to these two sub-categories, the great majority of their time would have been fully compensable.

Balancing these factors, it is recommended the court award compensation for 50% of the hours claimed in sub-category "I" ("Miscellaneous; General Advice and Meetings with Clients") and in the un-numbered sub-category entitled "Non-Designated Time."

C. Adequacy of Documentation.

[76] An attorney seeking a fee award has the burden adequately to document all of the hours claimed. Detailed, contemporaneous records are strongly preferred for this purpose, but are not absolutely necessary.

On the whole, the Tribal attorneys have done exceptionally well in providing this documentation. This is particularly true, given the number of attorneys (29), the fact that they use many different record-keeping systems, the time range covered (13 years), the number of hours

(almost 24,000), and the multi- faceted nature of the case. The State has forthrightly conceded the generally high quality of the documentation.

The lack of subject matter designation in two of the sub-categories has already been discussed. Only one other aspect of documentation merits discussion.

Several of the Tribal attorneys have submitted claims for time worked during periods when it was not their office practice to keep contemporaneous, detailed records. This includes at least Messrs. Schlosser, Stay, Taylor and Clinebell. Each of these attorneys has, however, made a detailed showing as to how he re-constructed and estimated the time included in his claim. Each has persuasively shown that he has painstakingly derived time estimates from reliable sources, and that his estimates

are conservative, probably understating actual time spent by a substantial margin. The State has presented no cogent challenge to these conclusions. The court should therefore allow these hours in full, despite the absence of detailed, contemporaneous records.

This finding would parallel that made by Judge Orrick in Phase II:

> "In limited instances in which hours requested were reconstructed, the sources used were reliable, the services performed were reasonably detailed, and the hours requested appear to have been conservatively estimated. Such reconstructions are a proper basis for awarding fees. Detroit v. Grinnell Corp., 560 F.2d 1093, 1102-03 (2d Cir.1977)."

"Memorandum Opinion and Order," filed December 18, 1981, at p. 8 (cited hereafter as "Phase II Fees Opinion").

D. "Reasonableness" of Hours Spent.

[77][78] The final issue in the area of the number of compensable hours is whether all the time claimed was "reasonably

expended" by the Tribal attorneys. As directed by the Supreme Court in Hensley, the court must eliminate any hours which were excessive, redundant or otherwise unnecessary. Furthermore, in claiming fees under s 1988, an attorney must exercise "reasonable billing judgment" similar to that he would employ in billing his own client.

[79] There can be no doubt that the Tribal attorneys claim compensation for a very substantial number of hours. But under all the circumstances, the court should conclude that all of the hours were "reasonably expended." This also would be consistent with the conclusion Judge Orrick reached in Phase II.

The complexity of the case, and the novelty and difficulty of the issues (the second Kerr/Johnson factor) are documented inter alia in the affidavits of Prof.

APPENDIX D

Ralph W. Johnson and Michael R. Thorp.

The court hardly requires documentation of these facts, in light of its experience with the case.

The eighth Kerr/Johnson factor is "the amount involved and the results obtained." While the case did not seek or result in a monetary judgment, the stakes were extremely high for all the litigants, and others. At issue were the respective rights of treaty and non-treaty fishermen to share in the harvest of salmon and other species. Each annual harvest is worth many millions of dollars; and the decision establishes permanent rights. The Tribes enjoyed an exceptionally successful result. Consideration of these factors supports the conclusion that the many hours claimed by the Tribal attorneys were "reasonably expended."

The Tribal attorneys have stressed, in

briefing and argument, the importance of the intransigent and obstructive posture of the State throughout this case. They allege the State has resisted and impeded enforcement of the court's orders, and has contested every possible issue, many of them more than once. To whatever extent this is true, its primary effect has been to swell the number of hours reasonably required for proper representation of the Tribes.

Other special characteristics of this case have the same effect. Counsel have been required to become highly knowledgeable in technical areas ranging from fisheries to Northwest history. The geographic spread of the twenty-six tribes, and the remoteness of some, have also contributed to the time required. All of these factors support the reasonableness of the hours expended by

the Tribal attorneys.

The State, however, challenges on several grounds the "reasonableness" of the time expended. First, the State asserts the Tribal attorneys devoted inordinate amounts of time to the case, given the important role played by the United States and its counsel. Much of the work of the Tribal attorneys, the State contends, unnecessarily duplicated efforts by counsel for the United States. A similar contention is that the many Tribal attorneys unnecessarily duplicated each other's efforts.

But the record does not bear out this contention. Affidavits of the Tribal attorneys, and of counsel for the United States, demonstrate several facts which controvert the State's position. In many respects, the positions of the Tribes differed from that of the United States,

and/or with each other. All counsel made diligent efforts to identify areas where their interests were congruent, and to share responsibility and avoid duplication in those areas. Frequently, many tribes agreed to prepare a single brief on behalf of all. Indeed, without this coordination and cooperation among Tribal attorneys and counsel for the United States, the time expended and claimed by Tribal counsel would have been much greater than it is.

The State has asserted duplication of efforts in a general way, but has not shown specific instances where this occurred. Its objection on this ground is without merit. Judge Orrick reached a similar conclusion in Phase II. "Phase II Fees Opinion," supra at pp. 1445-1446.

The State also asserts the Tribal attorneys have not exercised reasonable billing judgment because in some instances

an attorney claimed compensation for more than seven hours in one day; and because all Tribal attorneys' claimed an aggregate of 70 to 80 hours for one specific day. These objections are frivolous. An attorney who actually works abnormally long hours on a given day is certainly entitled to compensation for that time. The day which resulted in a large aggregate claim was the day several Tribal attorneys worked long hours together to meet a deadline in completing their lengthy brief in the United States Supreme Court. Incidentally, this was the principal instance in which the Tribal attorneys demonstrated the applicability of the seventh Johnson/Kerr factor, "time limitations imposed by the client or the circumstances."

Apparently in support of its challenge to the reasonableness of the hours claimed

by the Tribal attorneys, the State has submitted a computer analysis of the time records. See Exh. F to the State's Memorandum filed February 27, 1982. But this computer analysis is very difficult to use and to understand; and has been demonstrated to be factually erroneous as to several material matters. It is of little or no probative weight as to the reasonableness of the hours claims.

In summary, the court should find the time claimed by the Tribal attorneys in compensable sub-proceedings was all "reasonably expended."

V. HOURLY RATES

[80] In calculating the "lodestar" amount, the court must next set hourly rates of compensation for each of the 29 Tribal attorneys. In setting those rates, the court should consider the following Johnson/Kerr factors:

(3) The skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(7) time limitations imposed by the client or the circumstances;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client;

and

(12) awards in similar cases.

The Supreme Court, in Blum, also directs the district court to take the quality of representation into account in setting hourly rates.

The Tribal attorneys have made

persuasive showings as to all of these factors except the eleventh Johnson/Kerr factor, "the nature and length of the professional relationship with the client." There has been no showing that the fee award should be affected in any significant respect by this factor. The other factors, and their significance to the award in this case, are discussed below.

The parties present three principal issues related to fixing hourly rates:

A. Should the court use "historic" or "current" rates? Are the Tribal attorneys entitled to compensation for the delay in receiving payment?

B. What specific rates should the court use? What are the significance of prevailing contract rates and the non-profit status of Evergreen Legal Services and NARF?

C. Should travel time be compensated at a lesser rate?

A. Historic or Current Rates?

[81] The fee award covers services provided as early as 1970. The Tribal attorneys argue persuasively that it would be unfair to pay them, in 1984, fees at rates in effect at the time they performed the services ("historic rates"), without an adjustment to reflect the delay in payment. This is especially true in light of the marked inflation during the period covered by the award.

The State argues, essentially on two grounds, that the court should make no adjustment to the historic rates. First, the State asserts the Tribal attorneys have been dilatory in applying for Phase I fees. Secondly, the State contends because it has not been responsible for any delay in the fee award, it should not

be penalized by an award at rates higher than the historic rates.

Neither of the State's contentions has merit. The Tribal attorneys then participating in the case applied for Phase I fees in 1974. The question of whether they were entitled to fees was litigated at length, both in this court and in the Court of Appeals. This history is summarized at pages 5-7 of the Tribes' "Narrative of Phase I Litigation," filed November 27, 1981. Meanwhile, litigation of the merits of the case continued, leading to the Supreme Court decision in 1979. The Tribal attorneys renewed and supplemented their fees application in 1981, culminating in the present adjudication. In light of this history, the Tribal attorneys have not been dilatory in seeking fees.

Adjustment of the award to compensate

for the delay in payment bears no relation to whether the State was responsible for the delay. Whatever the cause of the delay in the award, today's dollars are worth less than dollars at the time the fees were earned; and the State has had use of the money in the meantime.

The Tribal attorneys are therefore entitled to an enhancement of the award to compensate for delay in payment. The more difficult question is, how this should be accomplished.

The Tribal attorneys urge the court to compute all fees on the basis of today's prevailing hourly rates ("current rates"), regardless when the services were performed. They further suggest that the hourly rate for each attorney be selected on the basis of his or her experience level in 1984, not at the time he or she performed the services. For example, if

an attorney admitted to practice in 1974 performed services in 1975, they contend he should be compensated at the rate prevailing in 1984 for an attorney with ten years' experience, not at the 1975 rate for an attorney with one years' experience.

In support of these contentions, the Tribal attorneys argue the delay in payment of their fees has damaged them in two distinct ways: (a) the value of the award has been eroded by substantial inflation; and (b) they have lost the opportunity for use of the funds in the interim. They contend the award should be enhanced to compensate for both factors--i.e., more than would simply be required to reflect the effects of inflation.

In awarding fees for Phase II, Judge Orrick used current rates. His opinion

provides very limited discussion of the issue. "Phase II Fees Opinion," supra at p. 1448.

The parties have cited no controlling Ninth Circuit authority on this issue. But appellate decisions from other circuits reflect a wide range of approaches. In a number of cases, the Courts of Appeals have upheld awards based upon current, not historic rates. Examples include Gautreaux v. Chicago Housing Authority, 690 F.2d 601, 612-613 (7th Cir.1982) cert. denied 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983); Graves v. Barnes, 700 F.2d 220, 224 (5th Cir.1983); and Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir.1983).

By contrast, the Second Circuit reversed an award based on current rates in New York State Ass'n. for Retarded Children v. Carey, 711 F.2d 1136, 1152-3 (2d Cir.

1983). The court noted that while neither historic nor current rates are ideal, use of current rates in that case gave plaintiffs a considerable windfall, because billing rates grew much faster than inflation in the period in question. The court held:

> "We conclude that historic rates should be used for both profit-making firms and non-profit law offices in setting fee awards in multi-year cases. While not a perfect solution, the use of historic rates at least conforms to Congress' instruction to avoid windfall awards."

711 F.2d at 1153. The court then directed the use of rates calculated by adjusting prevailing rates to reflect changes in price levels.

Finally, in Morgado v. Birmingham-Jefferson County Civil Defense Corps., 706 F.2d 1184, 1193-4 (11th Cir.1983), cert. denied, 464 U.S. 1045, 104 S.Ct. 715, 79 L.Ed.2d 178 (1984), the court held that where an award is based on historic rates,

"... a percentage adjustment to reflect the delay in receipt of payment is appropriate." 706 F.2d at 1194.

If any generalizations are possible from these and other cases, they appear to be that the district court should make an inflation/delay adjustment; but how it does so rests in the sound discretion of the court.

For the reasons discussed below, it is recommended that this court use historic rates, adjusted for effects of inflation, in computing Phase I fees. With all due respect, this represents the only major recommended departure from the conclusions reached by Judge Orrick in Phase II. A number of decisions on the issue, such as that of the Second Circuit in New York State Ass'n. For Retarded Children, supra, and that of the Eleventh Circuit in Morgado, supra, have been published since

APPENDIX D

Judge Orrick's decision. In addition, the Phase I fees application covers 13 years, a much longer span than the Phase II application, and a claim for about five times as many hours. While current rates might have produced roughly fair results in Phase II, they are much less satisfactory in Phase I.

Accordingly, it is recommended that the court should use historic rates, with each adjusted to reflect the intervening change in the Consumer Price Index. For example, for services performed in 1975, an attorney should be compensated at an hourly rate computed as follows:

Compensation Rate = (1975 rate) x 1984 C.P.I./1975 C.P.I.

The basic advantage in the use of historic rates is that it provides, as a starting point, the rate prevailing at the time the services were performed. As in

the purchase of any goods or services, the appropriate price presumptively is the one prevailing at the time of the purchase. The client could expect to be billed at that rate, not at the rate prevailing today, perhaps 12 years later. Similarly, that rate should at least be the starting point for calculating the fee the opposing party is required to pay on behalf of the prevailing client.

The Tribal attorneys urge that use of current rates is the fairest way to compensate for both inflation and "lost opportunity cost." But they have not persuasively argued that they are entitled to an adjustment above that required to offset inflation. The cases they cite do not hold a prevailing party is entitled to such a "double-barrelled" enhancement of the award. While an adjustment for inflation is proper, this court should

decline to make a further adjustment for "lost opportunity costs."

If the objective is to compensate for inflation, use of the Consumer Price Index is a much more appropriate tool than use of current hourly rates. The movement in current rates might, fortuitously, mirror the movement in price levels generally. But the C.P.I. is, itself, the most widely accepted measure of those price levels. In fact it appears that prevailing billing rates in Seattle have increased faster than inflation generally.[1] Use of current rates would therefore provide a windfall for the Tribal attorneys, and be unfair to the State and its taxpayers. This parallels the observations of the Second Circuit in New York State Ass'n.

Mr. William H. Ferguson, in an affidavit discussed more elow, indicated that prevailing rates doubled between 1975 . Attachment F to Plaintiff's Memorandum submitted r 25, 1981, at pages 10, 11, and 13-14.

For Retarded Children, supra.

In determining which historic rate to use, the court should consider the experience level of the attorney at the time he or she performed the services--not the experience level in 1984.

B. What Are The Historic Rates?

The next task, therefore, is to determine the proper hourly rates for services by the Tribal attorneys in each of the years from 1970 through 1982, inclusive.

[82][83] The basic guides to these rates are the prevailing rates charged at the same time by private attorneys in this community for similar work under similar circumstances. Two related threshold issues merit discussion. First, non-profit legal organizations, such as Evergreen Legal Services and Native American Rights Fund ("NARF"), are

entitled to fees calculated on the same basis as private attorneys. The Supreme Court in Blum put to rest any issue in this respect raised by earlier cases. Secondly, Tribal attorneys are entitled to have their fees calculated in accordance with prevailing community rates, even if a lower rate is prescribed in a contract executed by their client and approved by the Bureau of Indian Affairs. Judge Orrick so held in Phase II. "Phase II Fees Opinion," supra at p. 1451. The Ninth Circuit approved a similar holding recently in White v. City of Richmond, 713 F.2d 458, 461 (9th Cir.1983).

We turn, therefore, to determining prevailing historic rates. This could be an immensely complex task, as 29 different lawyers, eight Johnson/Kerr factors, and 13 different years must be considered.

Fortunately, the problem is simplified

by the fact that the Tribal attorneys have made a factual showing as to the prevailing rates, and the State has presented virtually nothing in opposition.

The Tribal attorneys filed, first in the Phase II fee proceedings and then here, a comprehensive affidavit of William H. Ferguson. Mr. Ferguson was a highly respected member of the Seattle bar, with extensive experience in the litigation of complex cases in the United States District Court for this district until his recent death. As senior partner in his law firm, he was fully familiar with billing rates for work in this court, both for his own firm and for others. In his affidavit, he presented a schedule of historic rates, and explained how, in preparing the schedule, he took into account not only the prevailing rates, but also all of the following factors:

APPENDIX D

(1) The complexity of the litigation, as reflected by his review of the pleadings and opinion in Phase II, and the material relating to the fee request;

(2) The length of the case;

(3) Its novelty;

(4) The complexity of the factual and legal issues;

(5) The skill of opposing counsel;

(6) The preclusion of other employment for Tribal attorneys;

(7) The risks to the Tribal attorneys, because their clients paid minimal fees;

(8) The great amount at stake in Phase II;

(9) The unpopularity of the position taken by the Tribal attorneys; and

(10) Their experience, reputation and ability.

APPENDIX D

The Tribal attorneys urge that Mr. Ferguson's observations in Phase II apply with roughly equal force in Phase I, and that the court should adopt his recommended fee schedule. The State has offered little or nothing in opposition.

Mr. Ferguson's affidavit is careful, comprehensive and persuasive. His observations on the factors listed above are basically accurate for Phase I as well. The court should therefore adopt his recommended schedule of fees.

Mr. Ferguson discusses several of the Johnson/Kerr factors in his affidavit. These include the customary or prevailing billing rates in this area, the experience, reputation and ability of the Tribal attorneys, the preclusion of other employment, and the undesirability of the case. He also discusses his experience with awards in other cases. Mr. Ferguson

took all of these factors into account in developing his schedule of fees. Thus, by adopting and applying that schedule, the court implements, inter alia, the third, fourth, fifth, ninth, tenth and twelfth Johnson/Kerr factors.

To determine an hourly rate from Mr. Ferguson's schedule, it is necessary to identify (a) the year in which the services were performed, and (b) the experience level of the attorney at that time. The rates do not vary with other individual characteristics of the attorney in question. The factors listed by Mr. Ferguson (complexity of the case, skill levels, etc.) were incorporated into the schedule itself. This is less precise than an attorney-by-attorney analysis of the kind done by Judge Orrick in Phase II. But it works a generally fair result, and is a much more manageable approach where

29 attorneys and 13 years are involved.

Mr. Ferguson's schedule does not, however, provide all the historic rates needed in Phase I, as earlier years and a wider range of experience levels are involved. In addition to Mr. Ferguson's affidavit, the Phase I record includes the showing as to prevailing rates made by the Tribal attorneys in 1974. Furthermore, the affidavit of Greg Dallaire, Director of Evergreen Legal Services, indicates the rates applicable for attorneys in that agency in 1974 and earlier. Finally, the Tribal attorneys have used the "Minimum Fee Schedule" in effect in Seattle through 1973, and have "interpolated" any additional rates necessary to provide a comprehensive schedule of historic rates.

Such a schedule appears at page 36 of the Memorandum submitted November 27, 1981 by the Tribal attorneys (docket no. 7973).

The State has offered no persuasive opposition to it; and the rates in the schedule seem fairly and properly derived. The court should adopt it, as correctly reflecting historic rates.

That table must be refined in three further respects before the court and the parties can use it in calculating fees. First, as to two entries in the schedule, Mr. Ferguson indicated a $5 range in prevailing rates. As he was the Tribes' witness, the court should interpret the affidavit in favor of the State, and use the figure at the low end of the range.

Secondly, the schedule (filed in 1981) did not reflect prevailing 1982 rates. But rates for attorneys at each experience level increased $10 from 1979 to 1980, and another $10 from 1980 to 1981. A similar $10 increase to 1982 would appear fair.

With these two refinements, the

APPENDIX D

applicable schedule of historic rates is as follows:

Work Done In	Admit to bar Before 1960	Admit to Bar Before 1970	Admit 70-72	Admit 73-76	Admit 77-Present
1970	$40	$40	$35		
1971	$40	$40	$35		
1972	$40	$40	$35		
1973	$40	$40	$35	$35	
1974	$40	$40	$40	$35	
1975	$65	$55	$50	$40	
1976	$75	$65	$55	$45	
1977	$80	$70	$60	$55	$45
1978	$90	$80	$70	$60	$50
1979	$100	$90	$80	$70	$55
1980	$110	$100	$90	$80	$65
1981	$120	$110	$100	$90	$75
1982	$130	$120	$110	$100	$85

The third necessary refinement to the fee schedule is the enhancement of the rates to compensate for inflation, as

discussed above. This will be done by the parties, prior to submission of the Second Report and Recommendation.

C. Travel Hours.

The final issue relating to hourly rates concerns compensation for approximately 400 hours spent in travel. In Phase II, Judge Orrick held:

> "The Court will not compensate counsel at their full rate for hours expended in travel to hearings, meetings of counsel, and client meetings because these hours, while reasonably expended, did not involve any legal ability or experience which is the basis for counsel's lodestar rate. See In re Equity Funding Corp. of America Securities Litigation, 438 F.Supp. 1303, 1330, 1343 (C.D.Cal.1977). To the extent that counsel did perform legal services while in transit, the hourly rate should be reduced to reflect the lesser efficiency that necessarily accompanies such efforts. See Keyes v. School District No. 1,Denver, Colorado, 439 F.Supp. 393, 409 (D.Colo.1977). For these reasons, the Court will compensate all travel time at the rate of $40 per hour."

"Phase II Fees Opinion," supra at p. 1447, n. 23.

APPENDIX D

Judge Orrick's conclusions are sound and this court should adopt a similar course in computing Phase I fees. Two relatively minor changes are in order, however.

First, instead of compensating travel at the same dollar rate for all attorneys, the court should apply in each instance half of the rate otherwise applicable.[2] A major factor in compensating travel time at all is that the attorney is precluded from performing work for other clients. Fair compensation therefore varies among attorneys, depending upon the value of their time.

Secondly, the Ziontz firm attorneys apparently have claimed all daytime travel at full hourly rates, but have submitted no claim for their after-hours travel. The court should grant their request to

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[2] For ease of computation, the Tribal attorneys might to reduce the number of travel hours by half, and b at the full rate.

revise their claim to include after-hours travel.

VI. MULTIPLIER

[84] These determinations will enable the parties to compute the compensable hours and hourly rates. This, in turn, determines the "lodestar" amount of the fee award.

The Tribal attorneys claim, however, that the court should increase the lodestar amount by application of a "multiplier." Prior to the decision of the Supreme Court in Blum, district courts had used multipliers with relative frequency to enhance fee awards to prevailing Civil Rights Act plaintiffs. On occasion, multipliers of 3.0 or higher were used, resulting in fee awards of triple the lodestar amount or more. In making these awards, the district courts cited a wide variety of factors, and

sometimes offered little if any analysis of the basis for applying a specific multiplier.

The decision in Blum reversed a fee award which included a 50% "bonus" (i.e. used a 1.5 multiplier). The court first held that where the number of compensable hours and the hourly rate are shown to be reasonable, "... the resulting product is presumed to be the reasonable fee contemplated by §1988." Blum, 465 U.S. at 897, 104 S.Ct. at 1548. This figure is subject to enhancement only under very limited circumstances (discussed more fully below). The court rejected use of multipliers under circumstances previously relied upon by some district courts, such as novelty and complexity of the issues, the special skill and experience of counsel, the results obtained in the litigation, or the number of persons

benefitted by the outcome.

In light of the Blum decision and earlier cases, the Tribal attorneys have substantially trimmed back their multiplier request from the version originally presented. They now ask the court, if it uses historic hourly rates, to apply a multiplier of 1.75 to those portions of the award which meet two tests:

> (a) The award is for time devoted to matters of the most significant risk, difficulty and importance. In this category they would include, "... the trial, the central appeals, the subsequent enforcement proceedings before the magistrate and district court and in the Ninth Circuit and Supreme Court appeals...." Memorandum re Recalculation of Tribes' Multiplier,

filed June 30, 1984, at p. 3.

(b) The multiplier would only be used for attorneys with 300 or more hours in the litigation. Fourteen of the Tribal attorneys so qualify.

Applying the holding of Blum to the circumstances of this case, however, it is recommended that the court not apply any multiplier to the lodestar amount in computing the final award.

This result would follow and conform with the decision of Judge Orrick in Phase II, declining to enhance the award by application of a multiplier.

Writing in December of 1981, Judge Orrick anticipated many of the holdings of the Supreme Court in Blum over two years later. For example, he held that because the rates of compensation for tribal counsel already reflect a high level of skill and sophistication in the

specialized area of Indian rights, a multiplier adjustment on this basis would be inappropriate. "Phase II Fees Opinion," supra at pp. 1448-1449.

The Supreme Court's clear directions in Blum only serve to confirm the correctness of Judge Orrick's determination. The court identified a single situation in which an upward adjustment might be justified. The district court in Blum had based its multiplier adjustment, in part, upon the "high quality of representation." The Supreme Court held this can be the basis of an upward adjustment only in rare cases:

> "The 'quality of representation,' however generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' "

APPENDIX D

465 U.S. at 899, 104 S.Ct. at 1549.

The Tribes achieved exceptional success in this case. And the quality of representation was extremely high. But the Tribal attorneys have failed to establish, by "specific evidence" or otherwise, the hourly rates recommended above fail to compensate them fairly for the quality of that representation. Indeed, these hourly rates are the ones proposed by the Tribal attorneys. The court should therefore regard with healthy skepticism their present claim that those rates are unfairly low.

The Supreme Court majority left partially open one other door to a possible multiplier adjustment. District courts have commonly adjusted fee awards upward in cases where the recovery of any fee at all was contingent upon a successful result. The Kerr and Johnson

cases recognized "whether the fee is fixed or contingent" as the sixth of the twelve relevant factors in setting a fee.

The district court in Blum included among its reasons for an upward adjustment a statement that, "The issues presented were novel, and the undertaking therefore risky." Stenson v. Blum, 512 F.Supp. 680, 685 (S.D.N.Y., 1981). But the Supreme Court rejected this as a basis for an adjustment in that case, finding nothing in the record to establish the contingent nature of the litigation. Indeed, the majority of the court reserved the question of whether an attorney can ever be entitled to an upward adjustment because his compensation is entirely contingent upon prevailing and recovering a fee under §1988. 465 U.S. at 901 n. 17, 104 S.Ct. at 1550 n. 17.

This case is similar to Blum in these

respects, and is controlled by its holding. None of the Tribal attorneys represented his or her client on a contingent fee basis. Most, if not all, of the private attorneys contracted for, and were paid, fees which were not conditioned upon a successful result. It is true that the non-profit legal organizations will receive fees only because their clients were prevailing parties. But this is not the type of "contingent fee" contemplated by those cases awarding upward adjustments. Private attorneys receive an enhanced award in contingent fee cases in part because all of their contingent fee Civil Rights Act cases must be financed by their successful ones. If a private attorney could not expect an enhanced fee in the successful cases, he or she might well hesitate to take any such cases for indigent clients.

This is not true, however, for the non-profit organizations, which look to foundations, charitable organizations and other sources to fund all of their activities. None of the Tribal attorneys, therefore, is entitled to an upward adjustment because the litigation was contingent in nature.

The Supreme Court did not expressly hold in Blum that the foregoing were the only two situations in which an upward adjustment might be appropriate. Future cases might define others. But the question of whether other special circumstances might justify use of a multiplier is academic for purposes of this case. In their post-Blum submissions, the Tribal attorneys have relied entirely upon quality of representation and contingency of the litigation in seeking the use of a

multiplier here. Because this case qualifies under neither of those criteria, the court should follow the decision of Judge Orrick and decline to apply a multiplier to the lodestar amounts.

VII. COSTS, INTEREST AND REFUNDS

Costs. The court has held that the Tribes are entitled, under §1988, to recover the costs they have incurred in Phase I. By order filed February 4, 1983, pursuant to the stipulation of the parties, the court has also referred this aspect of the case to the magistrate for recommended findings.

The Tribal attorneys submitted on April 19, 1982 a detailed claim for costs totalling $87,883.19. Although the State initially opposed the claim in several respects, the parties negotiated and eventually reached a constructive stipulation. The essence of that

stipulation is as follows. The claim for costs will be reduced in the same proportion as the court's reduction in the number of compensable attorney hours. In other words, if in fixing the fee award, the court disallows one-fourth of the hours claimed by the attorneys, the court will also reduce the cost award by one-fourth. The State will not oppose an award of costs determined in this manner.

The holdings set forth in this First Report and Recommendation will enable the parties to calculate the number of compensable hours, and therefore to compute the cost award as well. Those specific amounts will then accompany the Second Report and Recommendation.

The Tribes have already reimbursed their attorneys for, or have paid directly, many of the costs covered by the court's award. The Tribal attorneys and all of their

clients should be directed, therefore, to negotiate a written agreement as to the appropriate division of the court's award of costs. Each Tribal attorney and each Tribe must enter into the agreement, which is to be filed with the court and served upon the State. The court should enter its award of costs promptly after the filing of the agreement in proper form.

Interest. The court should provide that its orders awarding fees and costs shall constitute judgments entered in the United States District Court, and the awards shall bear interest at the rate(s) applicable to such judgments. Interest on an award shall accrue from the date the order is filed until the date actually paid. This would forestall any future litigation of the question of how counsel should be compensated for further delays in payment. This would be identical to

the course of Judge Orrick, who entered a judgment on his Phase II attorneys fee awards on October 16, 1982, and provided that the awards would bear "interest at the legal rate from the date of judgment."

Refunds of Attorneys' Fees. Many of the Tribes have already paid fees to their attorneys. When the State pays the fee awards, the Tribes will accordingly be entitled to refunds. Those refunds should be in the amount of fees actually paid, adjusted upward to reflect inflation to the date of the award, in the same manner as the fee award itself. The refunds shall bear interest after the award until paid by the Tribal attorneys at the same rate(s) as the awards. The court should direct the Tribal attorneys to pay these refunds within 30 days after the State pays the fee awards. The court should direct that, in the event of a dispute

between a Tribal attorney and his or her client as to the proper refund of fees, the Tribal attorney shall present the matter to the court for resolution within 60 days after the State pays the fee award.

VIII. CONCLUSION

The foregoing recommendations should provide the parties the basis for calculating the awards of attorneys fees and costs, if the court adopts the recommendations. Accordingly, the parties are directed to cooperate in an attempt to develop an agreed summary of such awards. That summary shall be filed as promptly as possible after filing of this First Report and Recommendation. If in good faith the parties are unable to reach agreement, they shall notify the United States Magistrate for scheduling of a conference or hearing.

APPENDIX D

This summary of specific recommended awards will permit the preparation of a Second Report and Recommendation.

The period for objections to the foregoing recommendations is suspended until submission of the Second Report and Recommendation.

APPENDIX E

MAGISTRATE'S SECOND REPORT AND RECOMMENDATION ON PHASE I ATTORNEYS' FEES
(December 12, 1984)

JOHN L. WEINBERG, United States Magistrate.

The Tribal attorneys have calculated the awards of attorneys' fees and cost which would result if the court adopts all of the recommendations contained in the "First Report and Recommendation on Phase I Attorneys' Fees." They filed the schedules of those awards, and various supporting documents, on December 3, 1984.

Counsel for defendants ("the State") has indicated by letter dated December 10, 1984 that the State has no objection to the computations submitted by the Tribal attorneys to implement the determinations suggested in the First Report and Recommendation.

Both parties have reserved their rights, however, to challenge the correctness of

those recommended determinations.

I have not attempted to review the various calculations underlying the December 3 filing of the Tribal attorneys, relying instead upon the defendants to bring any errors to the attention of the court. I have generally reviewed the submissions, however, and they appear in all respects accurately to implement the First Report and Recommendation.

The Tribes themselves have paid a portion of the costs which are covered by the court's award. Thus in several instances, the cost award must be apportioned between the Tribes and their attorneys. The First Report and Recommendation suggested the court approve the cost award only after the Tribes and their attorneys enter into written agreements as to the appropriate division. The Tribal attorneys, however, suggest

this is a cumbersome process and might unduly delay the balance of the award. They therefore propose that, where a division of an award will be required, the entire award be placed in the attorney's trust account until the agreement is signed and approved by the court. I recommend the court find this a satisfactory solution. The proposed order which accompanies this Second Report and Recommendation includes language to that effect.

I therefore recommend the court award attorneys' fees and costs, for the Phase I proceedings covered by this application, in favor of the recipients, against the State of Washington, and in the amounts listed below:

Recipient	Attorneys' Fees	Costs	Total Award
Ever-green Legal	$ 959,832.96		959,832.96

APPENDIX E

Services

Native American Rights Fund	330,224.14	12,535.73	342,759.87
Ziontz, Pirtle Law Firm	606,718.75	60,247.89	666,966.64
James Hovis	145,991.73	6,214.58	152,206.31
John H. Bell (Clinebell)	141,654.85		141,654.85
Bell & Ingram (For services of Lewis Bell, deceased)	37,888.48		37,888.48
Michael R. Thorp	3,164.31		3,164.31
Susan Kay Hvalsoe	12,476.54		12,476.54
Total	$ 2,237,951.76	78,998.20	2,316,949.96

A proposed Order accompanies this Second Report and Recommendation.

By agreement of the parties, both sides may file and serve objections within 30 days after the filing of this Second

APPENDIX E

Report and Recommendation. Both sides may file and serve replies within 14 days thereafter. The matter will then be ready for disposition by the court.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,	)	
Appellees,	)	
v.	)	Nos. 85-3908 85-4009
STATE OF WASHINGTON, et al.,	)	
Appellants.	)	ORDER

Before: WRIGHT and ANDERSON, Circuit Judges, and LYNCH,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied

and the suggestion for a rehearing en banc is rejected.

The motion of 33 Indian tribes and communities and the American Civil Liberties Union to file an amicus curiae brief is DENIED.

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*The Honorable Eugene F. Lynch, United States District Judge, Northern District of California, sitting by designat

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-429

MAKAH TRIBE, ET AL.,

Applicants,

v.

WASHINGTON, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS SO ORDERED that the time for filing a petition for a writ of certiori in the above-entitled cause be, and the same is hereby, extended to and including January 13, 1988.

/s/Sandra D. O'Conner
Associate Justice of
the Supreme Court of
the United States

Dated this 1st
day of December, 1987.